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In the
United States Court of Appeals
For the Seventh Circuit

No. 98-1726

The Hope Clinic, *et al.*,

*Plaintiffs-Appellees*,

v.

James E. Ryan, Attorney General of Illinois, and Richard K. Devine, State's Attorney of Cook County, Illinois,

*Defendants-Appellants*.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 8702--Charles P. Kocoras, *Judge*.

Nos. 99-2528 & 99-2533

Dennis D. Christensen, *et al.*,

*Plaintiffs-Appellants*,

v.

James E. Doyle, Attorney General of Wisconsin, and Diane M. Nicks, District Attorney for Dane County, Wisconsin,

*Defendants-Appellees*.

Appeals from the United States District Court
for the Western District of Wisconsin.

No. 98-C-0305-S--John C. Shabaz, *Chief Judge*.

Argued September 22, 1999--Decided October 26, 1999

Before POSNER, *Chief Judge*, and COFFEY, FLAUM, EASTERBROOK, MANION, KANNE, ROVNER, DIANE P. WOOD, and EVANS, *Circuit Judges*.*

EASTERBROOK, *Circuit Judge*. We must decide whether state laws prohibiting partial-birth abortions are unconstitutionally vague or unduly burden women's rights. Acting without an evidentiary hearing, a district court held the Illinois statute unconstitutional and entered a permanent injunction. *Hope Clinic v. Ryan*, 995 F. Supp. 847 (N.D. Ill. 1998). But after a trial, another district court concluded that the Wisconsin statute is valid. *Planned Parenthood of Wisconsin v. Doyle*, 44 F. Supp. 2d 975 (W.D. Wis. 1999). A panel of this court earlier had ordered preliminary relief against Wisconsin's law, see *Planned Parenthood of Wisconsin v. Doyle*, 162 F.3d 463 (7th Cir. 1998), and plaintiffs say that this decision, applying *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), justifies permanent injunctions against both states' rules. To ensure consistency, we heard the appeals en banc. We conclude that both laws *can* be applied in a constitutional manner. *Whether* that will occur depends on state courts, which alone can settle questions about the construction of the statutes. To ensure that physicians are not deterred from performing other medical procedures while issues wend their way through state tribunals, we hold that both sets of plaintiffs are entitled to injunctive relief that will limit the statutes' application to the medical procedure that each state insists is its sole concern.

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* Circuit Judge Ripple did not participate in the consideration or decision of these cases.

I

Induction, suction curettage, and dilation and evacuation (D&E) are the principal methods of performing abortions in the United States. Prohibiting any one of these would conflict with the right of abortion recognized by cases such as *Casey*, 505 U.S. at 877 (plurality opinion) (adopting "undue burden" as the constitutional standard), and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75-79 (1976) (holding that a state may not forbid saline amniocentesis, at the time the principal means of induction). Our cases involve an uncommon procedure known to the medical community as "intact dilation and extraction" or just "dilation and extraction (D&X)," and to the public as "partial-birth abortion."

Some medical background is essential to understanding the issues. Induction means inducing preterm labor, which causes the expulsion of the conceptus. Methotrexate or mifepristone (RU-486, now in clinical trials), in combination with misoprostol, can be used for this purpose early in pregnancy; saline amniocentesis and injected prostaglandins serve the same function in the second trimester. Suction curettage (vacuum aspiration), the most common surgical method of abortion early in pregnancy, refers to evacuation of the uterine cavity; the embryo or fetus is separated from the placenta either by scraping or vacuum pressure, then is removed by suction. When these methods are inappropriate, or do not work, physicians employ the D&E procedure. To perform a D&E, the physician dilates the cervix and dismembers the fetus inside the uterus using forceps. Fetal parts are removed with forceps or by suction.

A D&X is a variant of a D&E in which the fetus is removed without dismemberment. The American College of Obstetricians and Gynecologists (ACOG) defines D&X as follows: "1. deliberate dilatation of the cervix, usually over a

sequence of days; 2. instrumental conversion of the fetus to a footling breech; 3. breech extraction of the body excepting the head; and 4. partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus." Martin Haskell, the physician who developed the D&X procedure, see *Dilation and Extraction for Late Second Trimester Abortion* (1992), reprinted in 139 Cong. Rec. E1092 (Apr. 29, 1993), believes that how the head is diminished in size so that it can pass through the cervix is not important: mechanically crushing the skull serves the same end as evacuating its contents, which causes its collapse. It is this combination of coming so close to delivering a live child with the death of the fetus by reducing the size of the skull that not only distinguishes D&X from D&E medically but also causes the adverse public (and legislative) reaction. Opponents deem the D&X procedure needlessly cruel and bordering on infanticide, and all three states in this circuit have enacted statutory restrictions.

The statute in Illinois has three sections with legal significance:

> 720 ILCS § 513/5. Definitions
>
> In this Act: "Partial-birth abortion" means an abortion in which the person performing the abortion partially vaginally delivers a living human fetus or infant before killing the fetus or infant and completing the delivery. The terms "fetus" and "infant" are used interchangeably to refer to the biological offspring of human parents.
>
> 720 ILCS § 513/10. Partial-birth abortions prohibited
>
> Any person who knowingly performs a partial-birth abortion and thereby kills a human fetus or infant is guilty of a Class 4 felony. This Section does not

> apply to a partial-birth abortion that is necessary to save the life of a mother because her life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering condition caused by or arising from the pregnancy itself, provided that no other medical procedure would suffice for that purpose.
>
> 720 ILCS § 513/15. Civil action
>
> The maternal grandparents of the fetus or infant, if the mother has not attained the age of 18 years at the time of the abortion, may in a civil action obtain appropriate relief unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion. The relief shall include money damages for all injuries, psychological and physical, occasioned by the violation of this Act and statutory damages equal to 3 times the cost of the partial-birth abortion.

The Indiana statute defines "partial-birth abortion" in identical terms. Ind. Code § 16-18-2-267.5. Like Illinois it forbids partial-birth abortions unless that procedure is necessary to save the mother's life, and no other procedure would suffice. Ind. Code § 16-34-2-1(b). The Indiana statute has never been challenged and has been in effect since July 1, 1997.

Wisconsin has taken a slightly different approach. Its statutes provide:

> Wis. Stat. § 895.038 Partial-birth abortions; liability.
>
> (1) In this section:

(a) "Child" has the meaning given in § 940.16 (1) (a).

(b) "Partial-birth abortion" has the meaning given in § 940.16 (1) (b).

(2) (a) Except as provided in par. (b), any of the following persons has a claim for appropriate relief against a person who performs a partial-birth abortion:

1. If the person on whom a partial-birth abortion was performed was a minor, the parent of the minor.

2. The father of the child aborted by the partial-birth abortion.

(b) A person specified in par. (a) 1. or 2. does not have a claim under par. (a) if any of the following apply:

1. The person consented to performance of the partial-birth abortion.

2. The pregnancy of the woman on whom the partial-birth abortion was performed was the result of a sexual assault in violation of § 940.225, 944.06, 948.02, 948.025, 948.06 or 948.09 that was committed by the person.

(3) The relief available under sub. (2) shall include all of the following:

(a) If the abortion was performed in violation of § 940.16, damages arising out of the performance of the partial birth abortion, including damages for

personal injury and emotional and psychological distress.

(b) Exemplary damages equal to 3 times the cost of the partial-birth abortion.

(4) Subsection (2) applies even if the mother of the child aborted by the partial-birth abortion consented to the performance of the partial-birth abortion.

Wis. Stat. § 940.16 Partial-birth abortion.

(1) In this section:

(a) "Child" means a human being from the time of fertilization until it is completely delivered from a pregnant woman.

(b) "Partial-birth abortion" means an abortion in which a person partially vaginally delivers a living child, causes the death of the partially delivered child with the intent to kill the child, and then completes the delivery of the child.

(2) Except as provided in sub. (3), whoever intentionally performs a partial birth abortion is guilty of a Class A felony.

(3) Subsection (2) does not apply if the partial-birth abortion is necessary to save the life of a woman whose life is endangered by a physical disorder, physical illness or physical injury, including a life-endangering physical disorder, physical illness or physical injury caused by or arising from the pregnancy itself, and if no other medical procedure would suffice for that purpose.

Wisconsin's definition of partial-birth abortion is substantially the same as Illinois', but the mental-state elements differ, as do the maximum penalties: Illinois makes unjustified partial-birth abortion a Class 4 felony, with a maximum penalty of three years; in Wisconsin the offense is a Class A felony, for which Wis. Stat. § 939.50(3)(a) provides a penalty of life imprisonment.

Because Wisconsin and Illinois use similar language to define partial-birth abortions, we illustrate plaintiffs' concerns with the latter's statute:

> "Partial-birth abortion" means an abortion in which the person performing the abortion partially vaginally delivers a living human fetus or infant before killing the fetus or infant and completing the delivery. The terms "fetus" and "infant" are used interchangeably to refer to the biological offspring of human parents.

This legal definition is an imperfect match for the medical definition of D&X. It is easy to see why a legislature would be chary of the ACOG's specification: then any small variation (such as a change in the method of reducing the head size, or snipping off a toe to defeat the "otherwise intact" specification) would take the abortion outside the prohibition, even though the reasons why the technique has been deemed objectionable would be unaffected. But, as is common with legislation, the price of avoiding loopholes is generality. Section 513/5 captures the idea, central to the D&X procedure, that an intact fetus moves from uterus to vagina before death occurs. But it also uses the words "delivers" and "delivery," which many physicians understand to refer to any removal of fetal material from the uterus. The law might be read to prohibit the extraction of dismembered parts following a D&E, or to prohibit abortion by induction if by chance the fetus survives until it reaches the birth canal. Moreover, physicians performing a D&E sometimes do not

complete the dismemberment inside the uterus, and some fear that this could lead the procedure to be characterized as a partial delivery under the statute.

The possibility that § 513/10 might discourage risk-averse physicians from performing the D&E procedure led the district court in Illinois to declare that it is too vague to be enforced, and a similar concern animated our panel's decision to require preliminary relief against Wisconsin's law. Moreover, if these laws needlessly raise the effective costs of induction, suction curettage, or D&E, then they would unduly burden the right of abortion, another concern expressed not only by the district court in the Illinois case but also by the panel in the Wisconsin case. But after a trial on remand, the district court in Wisconsin concluded that physicians who perform abortions recognize that the statutory formula, however vague or broad these words appear to lay eyes, refers to the D&X procedure alone. The court held that, as so limited, the statute does not substantially burden any woman's right to an abortion, because D&X is never the only safe procedure.

Litigation elsewhere has produced results mirroring the divergence between the outcomes in Illinois and Wisconsin. The sixth circuit held that Ohio's ban on partial-birth abortions is unconstitutional, *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), but the fourth circuit issued a stay preventing interference with Virginia's statute. *Richmond Medical Center for Women v. Gilmore*, 144 F.3d 326 (4th Cir. 1998), motion to vacate stay denied, 1998 U.S. App. LEXIS 18547. Both of those decisions were rendered over dissents. A single panel of the eighth circuit recently held three states' partial-birth-abortion laws unconstitutional, but only after first concluding that all three statutes forbid the D&E procedure. *Carhart v. Stenberg*, 1999 U.S. App. LEXIS 23162 (8th Cir. Sept. 24, 1999) (Nebraska); *Little Rock Family Planning Services, P.A.*

*v. Jegley*, 1999 U.S. App. LEXIS 23165 (8th Cir. Sept. 24, 1999) (Arkansas); *Planned Parenthood of Greater Iowa, Inc. v. Miller*, 1999 U.S. App. LEXIS 23166 (8th Cir. Sept. 24, 1999) (Iowa).

## II

Plaintiffs would like us to employ the approach of our panel's opinion in the Wisconsin case and declare both states' laws unconstitutional without ado. But different statutes have different language, which may be important. Litigants also have made distinctive arguments--for example, Illinois relies on *United States v. Salerno*, 481 U.S. 739 (1987), for the proposition that, except in first amendment cases, a law may be held unconstitutional only when "no set of circumstances exists under which the Act would be valid." Moreover, two events since the panel wrote call for fresh analysis. First, that opinion dealt with preliminary relief and observed that "the full trial may cast the facts in a different light". 162 F.3d at 466. That trial has been held in Wisconsin, and its results must be considered. Second, both the panel's decision in the Wisconsin case and the district court's opinion in the Illinois case conclude that the statute *as written* is vague. A more recent decision of the Supreme Court, *Chicago v. Morales*, 119 S. Ct. 1849 (1999), stresses that state courts are entitled to construe state laws to reduce their ambiguity, and that federal courts should evaluate state laws as they have been construed, not just as they appear in the statute books. See also, e.g., *Parker v. Levy*, 417 U.S. 733 (1974); *Civil Service Commission v. Letter Carriers*, 413 U.S. 548 (1973). This implies that Illinois and Wisconsin are entitled to interpret their own laws--that federal courts should not enjoin all application before enforcement and thus prevent the state courts from having a chance to save their statutes.

*Salerno* offers a potential ground for giving the states that chance. It would be hard to say that every possible instance of the D&X procedure is protected by the Constitution. Along similar lines are the many cases saying that outside the domain of the first amendment, vagueness challenges must be assessed "as applied." See, e.g., *Maynard v. Cartwright*, 486 U.S. 356 1853 (1988); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982). But we are reluctant to rely too heavily on this approach, because *Morales* shows that three Justices believe that this language is too sweeping; see 119 S. Ct. at 1858-59 & n.22 (Stevens, J., joined by Souter & Ginsburg, JJ.), and the Supreme Court has on occasion resolved constitutional challenges to statutes that do not involve speech without asking whether every conceivable application would be unconstitutional. E.g., *Romer v. Evans*, 517 U.S. 620 (1996); *Kolender v. Lawson*, 461 U.S. 352, 358-59 n.8 (1983); *Nash v. United States*, 229 U.S. 373 (1913). Only one Justice offered any support for *Salerno*'s approach in *Morales*, and he did so in a dissenting opinion. 119 S. Ct. at 1867-72 (Scalia, J., dissenting). Justice Scalia identified many cases that articulate Salerno's requirement, and many others that bypass the inquiry. Courts of appeals are divided on the question whether *Salerno* applies to abortion legislation. Compare *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996), with *Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992). The safest course for a court of appeals, when confronted with inconsistent lines of precedent, is to decide on other grounds if at all possible. Here it is possible, for we think that the Supreme Courts of Illinois and Wisconsin could read their laws in ways that comport with the Constitution.

1. One means of doing this would be to assimilate the statutory definitions to the medical definition of D&X, with allowance for different ways of reducing the head size and other immaterial variations. Both states are concerned about the D&X procedure and did not set out to forbid any other.

The Attorneys General of Illinois and Wisconsin, the principal defendants, tell us that their statutes are concerned only with the D&X procedure and will be enforced only against its use. That assurance might be enough by itself, in the absence of any contrary indication from the state judiciary, to resolve immediate vagueness concerns. See *Frisby v. Schultz*, 487 U.S. 474, 483 (1988); cf. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76-80 (1997). Although local prosecutors (States' Attorneys in Illinois, District Attorneys in Wisconsin) initiate criminal prosecutions, representatives of these prosecutors have been named as parties in each case, and they agree with the Attorneys General. Plaintiffs object that this approach would rewrite rather than interpret the law, but we doubt this. Both medical and popular literature equate "partial-birth abortion" (the statutory term) with the D&X procedure. See Janet E. Gans Epner, Harry S. Jonas & Daniel L. Seckinger, *Late-term Abortion*, 280 J. Am. Medical Ass'n 724 (Aug. 26, 1998); M. LeRoy Sprang & Mark G. Neerhof, *Rationale for Banning Abortions Late in Pregnancy*, 280 J. Am. Medical Ass'n 744 (Aug. 26, 1998). The district court in Wisconsin found that this is the statute's aim. 44 F. Supp. 2d at 984 (relying on the Attorney General's concession). Using a medical definition to supplement a vague lay definition does not strike us as revisionism or an exercise in deconstruction.

But if this approach would nonetheless be an example of brute force used to save a statute-- well, courts do it all the time. Florida had a law forbidding "the abominable and detestable crime against nature". Placement in the code showed that this crime had something to do with sex, but what? Did it forbid incest? Necrophilia? Bestiality? A legal historian might give an answer, but to lay readers of the statute, and even to most lawyers, the words are Delphic. The state's highest court filled in the blank by saying that the object was sodomy--and the Supreme Court of the United States rebuffed a charge of unconstitutional vagueness, given

the state court's prestidigitation. *Wainwright v. Stone*, 414 U.S. 21 (1973). Only if vagueness remains after judicial interpretation is there a constitutional problem, the Court held. See also, e.g., *United States v. Lanier*, 520 U.S. 259 (1997); *Rose v. Locke*, 423 U.S. 48 (1975); *Lanzetta v. New Jersey*, 306 U.S. 451, 455-57 (1939); *Kolender*, 461 U.S. at 355-57. Federal courts have performed equally dramatic feats. As written, the Federal Election Campaign Act is hopelessly vague and overbroad. *Buckley v. Valeo*, 424 U.S. 1 (1976), saved the bulk of the statute by adding details. In two recent cases we predicted that state courts would follow suit with comparable state laws. See *Wisconsin Right to Life, Inc. v. Paradise*, 138 F.3d 1183 (7th Cir. 1998); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503 (7th Cir. 1998). In the latter case, because we were not completely confident that the state judiciary would follow *Buckley*'s path of freewheeling interpretation, we certified the issue to the Supreme Court of Indiana--which responded that it indeed possesses, and is inclined to use, that power. *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135 (Ind. 1999).

Relying on *Colautti v. Franklin*, 439 U.S. 379 (1979), the sixth circuit concluded in *Women's Medical Professional Corp. v. Voinovich* that any statute concerning abortion is unconstitutionally vague, no matter how precise an interpretation state courts eventually develop, unless it requires proof that the physician knows that a given act has been forbidden. If this were so, then the approach to avoiding vagueness that we have just sketched would be untenable. But it is not so; never has the Supreme Court held that all criminal laws (or even just all criminal laws affecting abortion) depend on scienter. Cases we have mentioned already (and more that we cite later) hold that a statute may be sustained against a charge of vagueness if, as construed, it gives reasonable notice of the forbidden conduct. That the notice does not sink in--that some people close their eyes (or

minds) and thus do not learn of the law's contents or appreciate its application to their conduct--does not prevent a state from enforcing its rules. See *United States v. Wilson*, 159 F.3d 280, 288-89 (7th Cir. 1998). This subject received sustained attention in *Karlin v. Foust*, 188 F.3d 446, 460-64 (7th Cir. 1999). For the reasons laid out in *Karlin* we respectfully disagree with the sixth circuit's understanding of this question. See also Note, 112 Harv. L. Rev. 731 (1999) (criticizing *Women's Medical Professional Corp.*).

**2.** Although the Constitution does not compel states to ameliorate vagueness problems by using a mental-state requirement to limit prosecutions to situations in which the defendant knows that his acts are forbidden, they are free to do so. This is the path the Supreme Court took in *Screws v. United States*, 325 U.S. 91 (1945), and *United States v. Kozminski*, 487 U.S. 931 (1988), to save 18 U.S.C. §§ 241 and 242. These companion statutes, the poster children for a vagueness campaign, make it a crime to deprive anyone of any constitutional right (or conspire to do so). These statutes are written entirely in terms that have been difficult to pin down, such as "under color of any law" and "rights, privileges, or immunities secured or protected by the Constitution . . . of the United States". Section 242 contains the word "willfully", and in *Screws* the Court read this to mean that a person commits the offense only if he knows that his acts deprive someone of a constitutional right. A person who actually recognizes his legal obligation can't complain that he lacked notice. Many cases since *Screws* use a knowledge requirement to prevent unfair surprise when the statute is vague or complex. E.g., *Cheek v. United States*, 498 U.S. 192 (1991) (tax laws); *Staples v. United States*, 511 U.S. 600 (1994) (gun-control laws).

Both Illinois and Wisconsin put mental-state elements in their statutes. Attorneys General of both states contend that under their laws a procedure may be deemed a "partial-birth

abortion" only if at the outset of the procedure the physician intends to perform all of the steps that mark the D&X. We think that the Supreme Courts of both states could go even farther and read the statutes to require knowledge of the legal rules, and thus to follow the trail blazed in *Screws*.

The critical language in Illinois reads: "Any person who *knowingly* performs a partial-birth abortion and thereby kills a human fetus or infant is guilty of a Class 4 felony." 720 ILCS § 513/10 (emphasis added). If the Supreme Court of Illinois reads "knowingly" in § 513/10 the same way the Supreme Court of the United States read "willfully" in § 242, then there is no vagueness problem with § 513/10. And we can't see any impediment to giving "knowingly" such a reading. In context, the word sounds distinctly like a requirement that the physician know that the medical procedure being performed is a "partial-birth abortion" and not simply that the physician know that he is performing particular physical acts. The most natural reading is one that requires knowledge of the law's application to the medical procedure being performed. Federal courts have been creative with knowledge requirements as a means of saving statutes against constitutional infirmity. E.g., *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994). Section 513/10 readily supports a construction that eliminates all concern about vagueness, which makes it inappropriate for a federal court to enjoin its application. (In *Morales*, the Supreme Court's most recent vagueness opinion, the lead opinion stressed that the statute lacked any mental-state requirement.)

Wisconsin uses the word "intentionally" rather than the word "knowingly." Its statute has two intent elements: a partial-birth abortion is defined as one in which the physician acts with "the intent to kill the child", Wis. Stat. § 940.16(1)(b), and the section defining the offense reads: "Whoever intentionally performs a partial-birth abortion is

guilty of a Class A felony." Wis. Stat. § 940.16(2). The reference to "intent" in § 940.16(1)(b) must mean "that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." Wis. Stat. § 939.23(4) (defining "with intent to"). The reference to "intentionally" in § 940.16(2) has at least potentially a broader scope. Although § 939.23(3) defines "intentionally" as "a purpose to do the thing or cause the result specified", a "partial-birth abortion" is neither a thing nor a result; it is a defined legal term. It is therefore a distinct possibility that the Supreme Court of Wisconsin will read this reference as equivalent to "wilfully" or "knowingly" notwithstanding the caution in § 939.23(5) that criminal intent "does not require proof of knowledge of the . . . scope or meaning of the terms used in" a statute. The question here is not whether a physician understands the terms of § 940.16(1)(b) in the abstract, but whether the physician intends that the plan of action add up to a "partial-birth abortion." In cases such as *X-Citement Video*, *Cheek*, and *Staples*, the Supreme Court of the United States was exceptionally creative with statutory allusions to mental states; plaintiffs have not established that the Supreme Court of Wisconsin would be unwilling to save its statutes the way the Supreme Court of the United States saved 18 U.S.C. § 242.

**3.** Still a third interpretive approach is open to the state courts. They may elect to apply the statute to its central core of meaning, the D&X, while working out in common law fashion its outer boundaries. See *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 986-90 (7th Cir. 1999). This is how the Supreme Court has chosen to proceed with respect to the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, a statute much less precise than the partial-birth-abortion laws. Long before the development of a body of antitrust rules, or even of a clear distinction between the domains of the per se rule and the rule of reason, the Court rebuffed a vagueness challenge,

remarking that "law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." *Nash*, 229 U.S. at 377 (Holmes, J.). The Court took the same approach in *Parker v. Levy* for Article 133 of the Uniform Code of Military Justice, which makes it a crime for a commissioned officer to engage in "conduct unbecoming an officer and a gentleman." That statute, compared to which § 513/5 and § 940.16(1)(b) are paragons of specificity, was sustained against a vagueness challenge because the military courts had added details over many years, and the Supreme Court anticipated that they would continue to do so as new situations arose. *Letter Carriers* applies the same approach to vague provisions of the Hatch Act. *Parker* cannot be passed off as a sport of military law; it is just one illustration of the proposition that vagueness may be overcome incrementally, as well as by an all-at-once construction. Consider *United States v. Powell*, 423 U.S. 87 (1975), a civilian case dealing with 18 U.S.C. § 1715, which makes it a crime to mail a firearm capable of being concealed on the person. A Derringer unquestionably qualifies, and although larger guns pose tough questions, the combination of a core meaning plus size as a metric for adjudication enabled the Court to hold that borderline cases could be decided later, as they arose.

Notice the difference between this approach and *Salerno*. In cases such as *Nash*, *Parker*, and *Powell*, the Court did not ask simply whether there was one constitutional application. It asked whether there was a core of meaning that people could grasp. In *Nash* the common law of restraint of trade supplied that core; in *Parker* the accumulated body of military precedents did so; in *Powell* the core comprised handguns. Occasionally the Court fortifies this approach by combining it with a scienter requirement, as *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), did for the Sherman Act. Illinois and Wisconsin can follow the same

path. For their statutes, the medical definition of the D&X procedure supplies the core of understandable application. Indeed, the district court in Wisconsin found as a matter of fact that physicians who are likely to perform an abortion already understand that this is the point of partial-birth-abortion statutes. 44 F. Supp. 2d at 978. That finding cannot be set aside as clearly erroneous.

Plaintiffs respond to this core-plus-common-law approach by contending that a statute is unconstitutionally vague until the interstices have been filled in. But then all of the cases we have cited were wrongly decided, for the interstices of antitrust law were not filled in by 1913, nor were all of the gun-mailing issues worked out before 1975: *Powell* involved a sawed-off shotgun, not a pistol. To say that the law cannot be applied to *anyone*, even a person who commits a violation within the core of the statute, until all issues about its reach have been resolved would prevent those issues from coming before the court to *be* resolved. How, precisely, are the interpretive wrinkles to be smoothed if the law can't be invoked? By advisory opinions? Anyway, there is always a periphery, no matter how many situations judges have evaluated. Resolving each new question moves the area of uncertainty but can't abolish it. "Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk." *United States v. Wurzbach*, 280 U.S. 396, 399 (1930) (Holmes, J.).

Protection for events outside the core is provided by the principle that surprising and unanticipated applications of a criminal statute violate the due process clause. See, e.g., *Bouie v. Columbia*, 378 U.S. 347, 351 (1964); *Marks v. United States*, 430 U.S. 188, 196 (1977); *Lanier*, 520 U.S. at 266. Given the assurances made in this litigation by the

Attorneys General of Illinois and Wisconsin, application of these states' partial-birth-abortion statutes to a normal D&E or induction (including one that began as a D&E but turned out to have elements of a D&X because of inadvertence or developments during surgery) would be surprising and constitutionally impermissible. Plaintiffs therefore can practice medicine without undue concern on the legal front. The Constitution provides the assurance they crave--but without the need to prevent application of the state law to the D&X procedure itself. States have a powerful interest in working out the details of their criminal laws in their own courts. See *Younger v. Harris*, 401 U.S. 37 (1971); *Nelson v. Murphy*, 44 F.3d 497 (7th Cir. 1995). On remand the district judges should enter precautionary injunctions, limited to implementing the conclusion of this paragraph that the state laws may not be applied to a normal D&E or induction until after the state has provided additional specificity, by statutory amendment, regulations, or judicial interpretation (which could arise either from civil litigation, see Part IV below, or from criminal prosecutions in which the parties disagree about whether the medical procedure properly may be labeled a D&X). With that assurance in hand, plaintiffs would not face any *substantial* threat of prosecution.

A skeptic might respond: what's the basis for an injunction without a finding of actual constitutional violation? The basis is the risk that plaintiffs face. See *Ex parte Young*, 209 U.S. 123 (1908). Whenever suit is brought against a statute that has yet to be enforced, there is a chance that what the federal court does will be unnecessary or even advisory--for in the absence of relief the statute might *never* be enforced in a way that plaintiffs fear, or that would violate their rights. Everything depends on probabilities. Plaintiffs believe that the probability of improper prosecution is so high that the statutes must be enjoined root and branch. We think that the probability of improper prosecution is low, but non-zero; and a prosecution for performing a D&E not only raises

vagueness concerns but also could unduly burden women's rights (see Part III below). That risk can be reduced to a constitutionally acceptable level with a simple injunction based on *Bouie*.

Persons who believe that the risk of improper prosecution is so high that *all* prosecution under the statute should be enjoined are poorly situated to contend that the risk also is so low that the plaintiffs lack standing under *Los Angeles v. Lyons*, 461 U.S. 95, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983). When this case began the plaintiffs faced a real risk and therefore had standing; and no one thinks that defendants' representations about their projected course of enforcement have made the controversy moot. If as plaintiffs believe the Constitution requires an injunction against everything Illinois and Wisconsin have enacted, *despite* these assurances, then the Constitution can't simultaneously forbid an injunction against potential misuses of state power in the enforcement of these laws. Article III does not limit a federal court's choice to enjoining nothing, or enjoining everything. The path we choose allows the states to interpret their laws and supply more concrete rules, see *Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976); the path the plaintiffs (and our dissenting colleagues) prefer would foreclose now and forever all interpretation by the state judiciary. By filing suit against a novel and ambiguous law in federal court, litigants can't preclude interpretation by the state judiciary. Our precautionary approach preserves the state judiciary's role while protecting plaintiffs' (and their patients') legitimate interests in the interim.

**4.** In the Wisconsin case our panel expressed concern that even if the probability of unanticipated application is low, the penalty is so high (life imprisonment) that physicians would avoid performing the D&E procedure. 162 F.3d at 469. This cannot be said of Illinois, where the maximum penalty is three years' imprisonment. Although the threat of life in

prison has a greater potential to induce caution than does the threat of three years in prison, the precautionary injunction discussed above should reduce the risk of improper or unanticipated application to a trivial level. The right constitutional objection to a Draconian penalty is not vagueness (a statute's scope is equally clear or uncertain whether the penalty is a $10 fine or 20 years in prison) but a contention that severe criminal punishment for a medical misunderstanding would inflict cruel and unusual punishment. Plaintiffs themselves do not make such an argument, however; they object to the substance of the state laws, not to the punishment available on conviction. The penalty is an afterthought, scarcely mentioned in their briefs. If Wisconsin should some day impose a lengthy prison term for a violation of § 940.16(2), then it will be time to consider arguments based on the eighth amendment.

**5.** For the last two years, a natural experiment has been conducted in the United States. Thirty states enacted laws forbidding most partial-birth abortions. Judges prohibited the application of these laws in two-thirds of these states; in the other third the statutes have been in force. One way to perform a reality check on the district court's conclusion in the Wisconsin case that physicians know that these statutes cover only the D&X is to see what has happened in the states where the laws have been permitted to take effect. Vagueness could affect physicians in either or both of two ways. First, they might send women seeking second-trimester abortions to other states that do not regulate partial-birth abortions. The result would be a decrease in second-trimester abortions as a percentage of all abortions in the state. Second, physicians might select a different procedure--principally substituting induction for a D&E--even though the replacement was medically inferior. This would produce a change in the ratio of inductions to D&E procedures in the affected state.

Indiana supplies a nice test, because its law took effect on July 1, 1997, so it is easy to compare the first six months of 1997 to the second six. Moreover, Indiana is surrounded by states that lack an effective prohibition on partial-birth abortions (because of the Illinois injunction and the sixth circuit's ruling in *Women's Medical Professional Corp.*), so it was relatively easy for physicians to send their patients elsewhere. Although the maximum penalty in Indiana is not steep (an unjustified partial-birth abortion there is a Class C felony, Ind. Code § 16-34-2-7(a), for which the punishment is four years' imprisonment, Ind. Code § 35-50-2-6(a)), no state or federal court has construed the statutory term, so whatever uncertainty the raw text of the statute engenders is unabated.

During 1997 a total of 13,208 abortions were performed in Indiana. (These data come from tables prepared by Indiana's State Epidemiologist.) During the first six months, 74 late-second-trimester abortions were performed: 72 by D&E and 2 by intra-uterine prostaglandin injection. During the second six months (that is, after the partial-birth-abortion law took effect), 87 late-second-trimester abortions were performed, all by D&E. Thus physicians did *not* substitute induction for D&E in order to reduce risk to themselves. Nor did they avoid the D&E procedure by sending women to other states. Abortion by D&E during the first six months represented 1.03% of all abortions performed in Indiana (72 of 6,950). Abortion by D&E during the second six months represented 1.39% of all abortions in the state (87 of 6,258). These data are incompatible with plaintiffs' *a priori* belief that the partial-birth-abortion statutes will discourage the performance of the D&E procedure or cause the physician to substitute an inferior procedure. Perhaps things have turned out differently in other states, or perhaps physicians behaved differently in 1998 or 1999. We do not mean to preclude plaintiffs from submitting the data in Indiana and other states to rigorous analysis. A few procedures were classified in the

tables as "unknown," which may mask some effects--though the number of "unknown" procedures did not change much from the first to the second half of 1997. Our point is only that a simple inquiry reinforces the findings of fact made in the Wisconsin case and implies that partial-birth-abortion statutes need not have the baleful effects that plaintiffs foresee.

## III

Plaintiffs in both cases contend that, even if the statutes are precise enough to be enforced, they create an undue (and therefore unconstitutional) burden on abortion. The eighth circuit reached this conclusion in *Carhart* and its two companion cases, but only after first holding that the state laws effectively prohibit the D&E procedure. If we thought that the Illinois or Wisconsin laws forbade D&E, then *Planned Parenthood of Central Missouri v. Danforth* would require us to agree with the eighth circuit. For reasons we have already given, however, we believe that state courts are entitled to accept the view of both states' Attorneys General that their laws do not forbid, or even affect, the D&E procedure. The question we must address, then, is whether a statute limited to D&X unduly burdens abortion.

One reason why this might be so is that neither state's law contains an exception for situations in which the D&X procedure is necessary to protect the woman's health. A second argument is that any prohibition of any medical procedure unduly burdens a woman's right to abortion. The first line of argument finds some support in *Casey*, which held that any regulation of abortion must make an exception for procedures that protect "the woman's life or health", 505 U.S. at 846 (emphasis added), as well as our panel's decision in the Wisconsin case, 162 F.3d at 467-68, 470-71. But we do not think that the plurality in *Casey* meant this as a universal rule, one applicable even when the procedure in

question lacks demonstrable health benefits. The point that the plurality made was that a statute that lacks a "health exception" may unduly burden the woman's right to obtain an abortion before the fetus has reached viability; when state law offers many safe options to that end, the regulation of an additional option does not produce an undue burden.

Section 513/10 of the Illinois statute contains an exception for "a partial-birth abortion that is necessary to save the life of a mother because her life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering condition caused by or arising from the pregnancy itself, provided that no other medical procedure would suffice for that purpose." It does not contain a comparable exception for a partial-birth abortion that promotes the woman's health. Wisconsin's law has a similar structure. Both sets of plaintiffs contend that the lack of an exception for a woman's health dooms the statute. Coming from the Illinois plaintiffs, this is a weak argument indeed, for *none* of the plaintiff physicians or clinics in Illinois uses the D&X, and none asserts any desire to start. Whether the D&X procedure sometimes would protect a woman's health is therefore immaterial to these physicians and the women in their care. But several of the plaintiff physicians in the Wisconsin case do employ the D&X procedure on occasion, so we must consider the merits of the argument.

After a trial, the district court in the Wisconsin case concluded that the D&X procedure is *never* necessary from the perspective of the patient's health. 44 F. Supp. 2d at 979-82. This conclusion cannot be called clearly erroneous; as things transpired, it was not a seriously contested issue. None of the plaintiff physicians in that case testified to the contrary. The district court summed up:

> None of the physicians would state unequivocally that the D&X procedure is safer than the D&E procedure.

> Broekhuizen conceded that further study of the procedures is required. Smith admitted that he had never encountered a situation where D&X would have been the best procedure to use. Haskell, who invented the procedure, admitted that the D&X procedure is never medically necessary to save the life or preserve the health of a woman. Giles agreed.

*Id.* at 980. The judge added that, although the D&X procedure has been used for more than a decade, no published study compares the risks of D&X to those of D&E. *Id.* at 979. Some authors believe that the D&X procedure is more hazardous. See Sprang & Neerhof, *supra*, 280 J. Am. Medical Ass'n at 746 ("Intact D&X (partial-birth abortion) should not be performed because it is needlessly risky, inhumane, and ethically unacceptable."); Nancy G. Romer, *The Medical Facts of Partial-Birth Abortions*, 3 Nexus 57 (1998).

Plaintiffs have not identified any data that undercut the district court's finding of fact. Their principal medical reference is the ACOG's 1997 statement and technical bulletin on the D&X procedure, which concluded that, although D&X is never the only medically appropriate option, choice still should be reserved to the physician. Although the statement asserts that D&X sometimes may be the best option, the ACOG did not identify any concrete circumstance under which this would be so or provide support for the assertion. Several of the plaintiff physicians testified to like effect, again without specifics or data. No published medical study fills the gap. Cf. *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167, 1177-79 (1999). Unelaborated avowals do not demonstrate that a finding of fact reached after a trial is clearly erroneous. When there is a conflict in the testimony--and that is the description most favorable to the plaintiffs--the finder of fact is entitled to choose. See

*Anderson v. Bessemer City*, 470 U.S. 564 (1985). We proceed on the assumption, which appears to be shared by the American Medical Association, that the D&X is not the best or safest option in any articulable category of situations. The AMA's Policy H-5.982 concludes, among other things, that "there does not appear to be any identified situation in which intact D&X is the only appropriate procedure to induce abortion." The district court in Illinois did not make contrary findings, or indeed *any* finding; acting without a trial or even an evidentiary hearing, it could not properly have rendered "findings" about disputed issues. District courts in other circuits have disagreed with the conclusions the district judge reached in the Wisconsin case, but this does more to show that the issue is debatable among reasonable persons than to show that a particular view is in error.

The question in the end is not what one or another judge found on a given record; it is whether the state legislatures exceeded their constitutional powers. Factual premises underlying legislation normally are not subject to review by trial courts. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-65 (1981); *Vance v. Bradley*, 440 U.S. 93, 111 (1979); *National Paint & Coatings Ass'n v. Chicago*, 45 F.3d 1124, 1127 (7th Cir. 1995). The district court's findings, the statements of medical groups, and the inferences to be drawn from what has happened in states that have implemented partial-birth-abortion statutes, are informative rather than conclusive on the question whether the underpinnings of the legislation are tenable. See Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985). Although "undue burden" analysis does not map neatly to the standard classifications ("rational basis," "strict scrutiny," and the like), making it hard to know the extent to which courts must respect legislative decisions about contestable factual matters, it is significant that none of the Supreme Court's decisions in abortion cases suggests that the

same law would be constitutional in one state, and unconstitutional in another, depending on a district judge's resolution of factual disputes. Thus we treat the findings in the Wisconsin case, like the view of the AMA, not as replacements for legislative conclusions, but as establishing that there is real, and not just hypothetical, support for a belief that the partial-birth-abortion laws do not pose hazards to maternal health. (This is the approach to evaluation of facts when the constitutional standard prescribes an intermediate level of analysis. See *Craig v. Boren*, 429 U.S. 190, 199-204 (1976).)

Only if every regulation related to abortions must contain a case-by-case "health exception" is there a problem with these laws. Yet *Casey* did not say that health effects must be evaluated case by case, rather than procedure by procedure. Abortions are not havens for junk science--so that, for example, the state must let any chiropractor perform an abortion, if the chiropractor believes that manipulation of the spine is safest for the woman. Cases such as *Mazurek v. Armstrong*, 520 U.S. 968 (1997), which held that states may limit performance of abortions to physicians, permit laws that regulate by class of procedures (or of medical providers). Cf. *United States v. Rutherford*, 442 U.S. 544 (1979) (FDA may ban a generally ineffective drug, even though for a few people it may be the only cure). Doubtless some nurses are better than some physicians at performing abortions, so patients' health would be improved by allowing these nurses to perform abortions; yet the Court held that states may provide otherwise. Similarly, Illinois and Wisconsin concluded that the D&X procedure is not essential to protect the health of any woman, given the availability of other procedures. Compilation of additional information by the medical profession could call this conclusion into question. As things stand, however, interference with the operation of the state laws cannot be justified on the ground that the D&X procedure is necessary to protect women's health.

A requirement of a case-by-case "health exception" to every statute concerning abortion would amount to a rule that no state may regulate any abortion procedure. For a physician will use a particular procedure only if in the physician's judgment the procedure is superior in some way--faster, safer, more likely to work (and thus indirectly safer because an abortion can be achieved with one procedure rather than two, with cumulative risks), or perhaps less expensive (and thus again indirectly safer, because the lower cost brings it within the reach of additional patients). Can plaintiffs, who object to the vagueness of the states' laws, really welcome a ruling under which every abortion creates the possibility of a prosecution in which the state invites a jury to disagree with the physician's assessment of the procedure's safety? A health exception, where jurors rather than physicians assessed health, would be an order of magnitude worse than the ambiguity plaintiffs perceive in the partial-birth-abortion laws. Perhaps plaintiffs believe that a "health exception" should make the physician's assessment of health consequences incontestable. That would avoid vagueness at the price of vitiating the laws. Some physicians are bound to think that a given procedure is safer or otherwise superior, even if the medical profession as a whole disagrees. A constitutionally based health exception for *every* procedure, coupled with a prohibition against review of physicians' beliefs about which procedures are safest, would amount to a rule that anything goes. And plaintiffs make this argument explicitly: they contend that any regulation of any medical procedure that pertains to abortion is an "undue burden" on women's rights.

To the observation that D&X is not an important procedure--indeed, that it is such a marginal procedure that few physicians anywhere in the nation (and none in Illinois) express any interest in performing it--plaintiffs rejoin that the question is not whether a law creates an undue burden for

women as a group, but only whether it does so for those women it affects. The affected set here is women for whom a physician will think that D&X is the procedure most likely to succeed, or to entail the least cost. For *these* women, plaintiffs contend, the burden is substantial and therefore "undue." Moreover, the argument continues, if the states are right--if D&X really is a procedure that the medical profession abjures--then the law must be political grandstanding. A restriction imposed for no better reason than to make a point has no benefits and therefore must be "undue," the argument concludes. On plaintiffs' approach, if the statutes actually accomplish something, then the burden is "undue" because the laws have effects; and if the laws accomplish nothing, then the burden is "undue" because any cost is excessive when the benefit is zero. Plaintiffs have the states both coming and going.

But this cannot be a sound understanding of *Casey*, or *Mazurek* would have come out the other way. By plaintiffs' lights, Montana's statute restricting the performance of abortions to licensed physicians would have had an "undue burden" on those women it affected--that is, the set of women for whom the extra cost of a physician's fees made obtaining an abortion impractical or burdensome. Yet the Court held that a physician-only rule is not an "undue burden," as the plurality in *Casey* used that phrase. What plaintiffs in our case really argue is not that limiting the D&X procedure to situations (if there are any) in which it is necessary to save the woman's life is an undue burden, when compared with other burdens (such as waiting periods, information requirements, parental approval or consultation requirements, and physician-only rules) that the Court has sustained; it is, rather, that *all* "burdens" are "undue" because women should have unfettered choice among medical procedures. But then the phrase "undue burden" is simply redundant; the word "undue" does no work.

It is always difficult for a court of appeals to predict how Justices of the Supreme Court will apply a phrase with as much plasticity as "undue burden." But our best estimate is that "undue" rather than "burden" is the key word, and that "undue" means not only "substantial" (a small cost or inconvenience is not "undue") but also that the burden must be undue in relation to the woman's interests, rather than undue in relation to the court's assessment of society's interests. Plaintiffs' (implicit) argument that every regulation of a medical procedure is "undue" fails because many regulations create small burdens. The physician-only rule was one; a prohibition of D&X is another. Even for the class of women who seek late-second-trimester abortions, there is always one or more other safe methods of abortion in addition to D&X. Let us return to the natural experiment now under way. Plaintiffs do not contend that in any of the states where a partial-birth-abortion law is in effect, even one woman has been injured or denied an abortion because of the law.

As for the second branch of plaintiffs' argument--that because the partial-birth-abortion laws do not diminish the number of abortions, they must be condemned as moralizing rather than utilitarian laws--this calls on judges to recapitulate *Lochner*'s methodology. This line of argument amounts to the contention that *Casey* so restricts the states' power that states are limited to symbolic gestures; and then the states' very attempt to comply with *Casey* by refraining from substantially impeding women's access to abortion dooms their laws. We do not read *Casey* as condemning states to this self-defeating legislative menu. So long as the law does not harm women's legitimate interests, the fact that the law's effects are small and justified by moral rather than utilitarian considerations does not spell unconstitutionality.

## IV

One final issue requires attention. The district court in Illinois read 720 ILCS § 513/15 to establish a parental-consent requirement, which the court enjoined because it lacks a judicial bypass procedure. 995 F. Supp. at 861, relying on a portion of *Casey*, 505 U.S. at 899-900, that reaffirmed *Hodgson v. Minnesota*, 497 U.S. 417 (1990). But what § 513/15 actually provides is different. It reads:

> The maternal grandparents of the fetus or infant, if the mother has not attained the age of 18 years at the time of the abortion, may in a civil action obtain appropriate relief unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion. The relief shall include money damages for all injuries, psychological and physical, occasioned by the violation of this Act and statutory damages equal to 3 times the cost of the partial-birth abortion.

Nothing here requires parental consent to a partial-birth abortion. Section 513/10 *forbids* most partial-birth abortions; no one can authorize that procedure in Illinois unless it is necessary to protect the woman's life, and then no parent's consent is necessary.

Section 513/15 provides civil damages for conduct that violates § 513/10, and it assigns the right to pursue these damages to parents if the person who undergoes the procedure is a minor. A parent who gave consent to the procedure naturally can't recover damages, even though a criminal prosecution remains possible under § 513/10 if the mother's life was not in jeopardy. The possibility that a parent may consent to an unlawful procedure (and thus insulate the physician from civil damages), or consent to a life-saving procedure for which no consent was necessary in

the first place, hardly implies that a judge also must be empowered to authorize a violation of § 513/10.

Wisconsin's civil-liability provision, Wis. Stat. § 895.038 (2), is entirely derivative from its criminal-liability provision, and the district court held it valid because the criminal provision is valid. Plaintiffs in the Wisconsin case do not take issue with this approach: they argue only that § 895.038(2) is unconstitutional because § 940.16 is unconstitutional. We therefore do not discuss § 895.038(2) further.

Actually, we have said too much already about the civil-liability provisions. They are enforced in private litigation; the states' Attorneys General and local prosecutors have nothing to do with civil suits. Relief against the public officials therefore would be pointless even if the civil-liability provisions were problematic. See *Summit Medical Associates, P.C. v. Pryor*, 180 F.3d 1326 (11th Cir. 1999). There is no controversy between the parties to this case that can be resolved by a declaration concerning the civil-liability rules. But see *Okpalobi v. Foster, 1999 U.S. App. LEXIS 22785* (5th Cir. Sept. 17, 1999) (purporting to enjoin a private-civil-damages provision in a suit to which only state officers were defendants, without mentioning the eleventh circuit's conclusion in Summit Medical).

The judgments in both cases are vacated. The cases are remanded with instructions to enter the precautionary injunctions discussed in Part II.3 of this opinion, to dismiss the challenges to the civil-liability provisions for want of a case or controversy, and otherwise to enter judgment for the defendants.

VACATED AND REMANDED

POSNER, *Chief Judge*, with whom ROVNER, DIANE P. WOOD, and EVANS, *Circuit Judges*, join, dissenting. Compromise holds seductive allure for a court faced with a hot issue, and there is none hotter than the issue of abortion rights. The Illinois and Wisconsin statutes criminalizing "partial birth" abortion are challenged here both as being unconstitutionally vague and as unconstitutionally burdening the right of abortion. (These are independent grounds; if either is valid, the statutes are invalid.) The court rejects both challenges yet orders the district courts to enjoin enforcement of the statutes against any method of abortion other than the one the medical community refers to as "intact D & E" (that is, intact dilation and evacuation) or, more commonly, "D & X" (dilation and extraction). This is the form of "partial birth" abortion that gave rise to these statutes, although they are not limited to it.

The court's decision is not a real compromise. It leaves intact the core of the statutory prohibitions, which unlawfully burden the right of abortion by outlawing the D & X procedure. The court does toss a bone to the plaintiffs, but at the cost of expanding federal judicial power over the states by a method that the Supreme Court has never countenanced and that violates Article III of the Constitution. It is a bone, incidentally, that the plaintiffs didn't ask for; neither side, in either case, requested this novel form of relief or commented on it in their briefs. We are taking a leap into the unknown without any input from the parties.

The "precautionary" injunctions that the court is directing the district courts to enter will forbid the enforcement of the statutes outside their core prohibition, thus placing the federal contempt power behind this court's interpretation of state statutes. The court does this while accepting the enforcers' assurances that they will not enforce the statutes outside the core, and concludes, therefore, "that the probability of improper prosecution is low." The states are

nevertheless to be enjoined because the probability, though low, is greater than zero. The probability of improper prosecution under *every* criminal statute ever written is greater than zero; and so the court's decision, should it be followed outside the abortion context--and nothing in the decision suggests a principled limitation to that context--implies a radical expansion of the power of the federal courts to superintend the enforcement of state statutes. State officials will be subject to federal contempt sanctions for failing to abide by a federal court's interpretation of the statutes that these officials, not federal judges, are charged with administering.

The court adds that while the probability of improper enforcement *now* is low, given the assurances that the state law enforcement authorities have made in their briefs in this court and at oral argument, the probability was high enough when these cases were brought to confront the plaintiffs with "a real risk" of being prosecuted for performing constitutionally privileged abortions. But if that is so, it means the statutes are unconstitutionally vague. If the law enforcers' present assurances are not enough to moot the case, how can they be enough to moot the central issue to which those assurances are addressed, the issue the court ducks of whether the statutes are in fact unconstitutionally vague? And if the present probability of improper enforcement is slight, as the court believes, what *equity* do the plaintiffs have to obtain an injunction?

The court is directing that state statutes be enjoined that it has not found either violate federal law or create a significant danger of such violation. This is unprecedented, and (on the court's view of the facts) violates Article III. If the court is right--I do not think it is, but it is the premise of the decision--that there is only a "non-zero" probability that either state statute will be enforced against any abortion procedure other than the D & X, the threatened injury is too slight to activate

the curative powers of federal courts. A nonzero probability could be a probability of one in a thousand, or one in a million. A probabilistic injury can support standing, e.g., *Clinton v. City of New York*, 118 S. Ct. 2091, 2100-01 (1998); *Walters v. Edgar*, 163 F.3d 430, 434 (7th Cir. 1998); *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991), but the probability must be nontrivial, not merely nonzero. E.g., *Murphy v. Hunt*, 455 U.S. 478, 482-83 (1982) (per curiam); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-07 and n. 8 (1983); *Walters v. Edgar, supra*, 163 F.3d at 434-35. Otherwise the federal courts will be flooded with cases, since few statutes are altogether free of vagueness; statutes that are too precise allow loopholes.

*Lyons*, the choke-hold case, makes the basic point. The probability that the plaintiff would again be arrested and subjected to a choke hold was held to be too slight to support standing. But it was no less than the implicit probability that this court today assigns to the threat of prosecution for performing abortions that the state law enforcement authorities concede are constitutionally privileged.

Although the injunctions that the court is ordering ostensibly are temporary, to remain in force only until the state courts have a chance to clarify the statutes, those courts are unlikely ever to get that chance, since the enforcement of the statutes beyond their core prohibition, which in the court's view needs no clarification, will be enjoined. Private civil suits are unaffected, but the provisions for civil enforcement of these statutes are limited and cases are unlikely. The Illinois statute authorizes civil suits only by the parents of a minor who has a "partial birth" abortion, and the Wisconsin statute by either the minor's parent or the fetus's father. Should a prosecutor indict a physician for performing a D & X, and the physician contend that it was really a D & E, the dispute will be resolved by the district court's interpreting its injunction in contempt proceedings.

As a practical matter, the courts of Illinois and Wisconsin will never have an opportunity to explore the outer bounds of these statutes.

The court cites no case that authorizes such injunctions. It relies on cases such as *City of Chicago v. Morales*, 119 S. Ct. 1849, 1861 (1999), and *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 5 (1982), which hold that if a state statute has been interpreted by the state's highest court, the interpretation binds any federal court asked to decide the meaning of the statute. No case holds, however, that until the statute is construed by the state courts, a claim that it is unconstitutionally vague is premature. No case denies the authority of the federal courts to interpret state statutes, which is something we do all the time. No case holds that *until* a state statute is construed by the state courts its operation may be enjoined without a determination that the statute is unconstitutional. All the cases on which the majority relies involve federal courts either narrowing federal statutes that are fairly susceptible of being narrowed or accepting as authoritative a narrowing interpretation of a state statute by a state court. In no case cited by the majority did a federal court impose its own narrowing interpretation on a state statute by injunction, let alone a state statute the language of which defies a saving interpretation.

Although grounded in a concern with preserving the prerogative of state courts to interpret state statutes, today's decision curtails that prerogative by forbidding the states to enforce state statutes that the court has *not* found to be invalid. The decision is thus internally inconsistent (the court both rejects the charge that the statutes are unconstitutionally vague and, by enjoining their application outside their small clear core until they are clarified by the state courts, holds that they are too vague to provide fair warning--which means they are unconstitutionally vague,

e.g., *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964)), as well as being an evasion of judicial duty, a violation of Article III, and an affront to federalism. The content of the injunctions that the court orders entered, moreover, is not specified; disputes over it will undoubtedly give rise to further litigation. And there will be a nice question of whether the plaintiffs can obtain attorneys' fees on the ground that they have won *something*, with the defendants arguing that it is *they* who have won the case because the court has both held the challenged statutes to be valid and accepted the defendants' assurances that the statutes will not be enforced beyond their valid scope.

On the merits, the most important issue raised by the appeals is that of undue burden. (I'll come back later to the substantive issue of vagueness, as distinct from the problems raised by the court's effort to evade the issue by means of the "precautionary" injunctions.) To understand this issue requires understanding the peculiar and questionable character of these statutes. They do not protect the lives of fetuses either directly or by seeking to persuade a woman to reconsider her decision to seek an abortion. For the statutes do not forbid the destruction of any class of fetuses, but merely criminalize a *method* of abortion--they thus have *less* to recommend them than the antiabortion statutes invalidated in *Roe v. Wade*, 410 U.S. 113 (1973). If any fetal lives are saved by these statutes, it will only be by scaring physicians away from performing *any* late-term abortions, an effect particularly likely in Wisconsin, whose statute imposes a punishment of life imprisonment for its violation. In tacit acknowledgment of that statute's especially questionable character, the majority opinion invites an Eighth Amendment challenge should a lengthy prison sentence ever be imposed on a violator of the statute.

The statutes do not seek to protect the lives or health of pregnant women, or of anybody else, as by confining the

performance of abortions to licensed physicians, as in *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam), or to facilities equipped to deal with emergencies that may arise in the course of an abortion, particularly a late-term one. A legislature can ban quacks from practicing medicine without making an exception for those quacks (and no doubt there are some) who are abler than the worst physicians. Any general health regulation is likely to hurt a few people. But as banning "partial birth" abortions is not intended to improve the health of women (or anyone, for that matter), it cannot be defended as a health regulation.

The statutes make no exception for cases in which pregnancy results from rape or incest, or in which the fetus is profoundly deformed, nonviable, or unlikely to live more than a few hours after birth, or indeed, as I shall show, in which the woman's life would be endangered if she carried the fetus to term. The absence of any such exceptions is particularly surprising because late-term abortions are much less likely than the much more common first-trimester abortions to be motivated by considerations merely of convenience rather than of urgency. A woman who finds herself five months pregnant is unlikely to decide to have an abortion unless advised by her physician either that the fetus is profoundly deformed or that her own health requires that the pregnancy be terminated. Indeed, if the fetus has become viable, she *cannot* lawfully obtain an abortion unless her life or health is in danger. Wis. Stat. § 940.15(3); 720 ILCS 510/5(1). These are constitutionally permissible protections of fetal life. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 879 (1992). It is incomprehensible to me why these states, if acting in good faith, were unwilling to write the same health exception into statutes that criminalize the abortion of nonviable as well as viable fetuses. The "partial birth" statutes do not distinguish between fetuses that are viable, in the sense of being sufficiently developed to be able to survive outside the

mother's body, and those that are not. Some fetuses don't become viable until 27 weeks or even later, but the "partial birth" abortion, even defined so narrowly as to cover only the D & X procedure, is performed from 20 weeks on. A physician might be convicted of a felony violation of these statutes even though the Supreme Court has held that a state may not prevent the abortion of a nonviable fetus. *Id.* at 846, 877.

The statutes do not outlaw a particularly cruel or painful or horrifying mode of abortion. This can be shown with the aid of a simple example. Suppose that the fetus is hydrocephalic, so that its head is too large to pass through the cervix. If the physician performing the abortion crushes the fetus's skull in the uterus, killing the fetus while the fetus is still entirely within the uterus, he is not guilty of violating either of the statutes before us. But if before crushing the fetus's skull the physician turns the fetus around so that its feet are protruding into the vagina, he has committed a felony. In both cases, the fetus is killed by the crushing of its head in the uterus. (The crushing is necessary to enable the fetus to be removed through the birth canal without making the woman go into labor.) From the standpoint of the fetus, and, I should think, of any rational person, it makes no difference whether, when the skull is crushed, the fetus is entirely within the uterus or its feet are outside the uterus. Yet the position of the feet is the *only* difference between committing a felony and performing an act that the states concede is constitutionally privileged.

The tortured efforts of the states' lawyers to provide guidance to physicians engaged in performing abortions--physicians who already are frequent subjects of picketing and other harassment and occasionally of physical assaults, see, e.g., *United States v. Soderna*, 82 F.3d 1370 (7th Cir. 1996), and who are now to be threatened with criminal prosecution and professional defrocking-- make one thing clear: it is

extremely difficult, indeed probably impossible, to distinguish a "partial birth" abortion from the methods of abortion that are conceded to be privileged. (This is the key to the statutes' vagueness, and so a point to which I'll return.) The principal reason for the difficulty is that, as my example of the hydrocephalic fetus suggests, there is no meaningful difference between the forbidden and the privileged practice. No reason of policy or morality that would allow the one would forbid the other. We should consider therefore why any state would pass such a law. An important part of the answer is found in Judge Manion's opinion in *Planned Parenthood of Wisconsin v. Doyle*, 162 F.3d 463 (7th Cir. 1998). The states want to dramatize the ugliness of abortion. "All methods [of abortion] are gruesome. But this is the one method that has been at least partially exposed to the light of day. . . . The exposure of this procedure has cast a bright light on the alternative procedures that are equally gruesome. . . . No doubt when this statute is properly construed--[so] that it bans only the rarely-used D & X procedure--it does not appear to accomplish much in the way of saving babies. But these laws have certainly elevated the public's concern over the fate of the 'potential human lives' that are exposed to abortion." *Id.* at 477, 479 (dissenting opinion). From this standpoint, the more a "partial birth" abortion is like an abortion that is conceded to be constitutionally privileged, the better.

The wave of "partial birth" abortion statutes that broke over the nation after a description of the D & X procedure was publicized--see Martin Haskell, "Dilation and Extraction for Late Second Trimester Abortion" (1992), reprinted in 139 Cong. Rec. E1092, 1993 WL 135664 (Apr. 28, 1993), and in *The Partial-Birth Abortion Ban Act of 1995*, Hearing before the S. Comm. on the Judiciary, 104th Cong., 1st Sess. 5 (Nov. 17, 1995)--does not exhibit the legislative process at its best, whatever one thinks of abortion rights. Whipped up by activists who wanted to dramatize the ugliness of abortions

and deter physicians from performing them, the public support for the laws was also based--as is implicit in Judge Manion's defense of the laws--on sheer ignorance of the medical realities of late-term abortion. The uninformed thought the D & X procedure *gratuitously* cruel, akin to infanticide; they didn't realize that the only difference between it and the methods of late-term abortion that are conceded all round to be constitutionally privileged is which way the fetus's feet are pointing. Opposition to the bills that became these laws was at first muted not only by ignorance of the character of a late-term abortion but also by the fact that few women are likely to be affected by the laws. Circumstances conspired, as it were, to produce a set of laws that can fairly be described as irrational.

This is a harsh verdict, but doubt about its soundness is laid to rest by the absence of any exception for situations in which a "partial birth" abortion is necessary to protect the pregnant woman's health. The right of abortion is unduly burdened by any law that endangers the woman's health. Even a law that limits only the right to abort viable fetuses--a limitation not found in the statutes challenged in this case--must, to pass constitutional muster, make an exception "for pregnancies which endanger the woman's life or health." *Planned Parenthood of Southeastern Pennsylvania v. Casey, supra*, 505 U.S. at 846 (emphasis added). Immediately the question arises why the Wisconsin and Illinois legislatures didn't try to come within reach of the cases that permit states to limit the right of abortion by making an exception for pregnancies that endanger the woman's health, the same exception they have written into their other abortion statutes. When pressed at argument, the lawyers for the two states could answer only that the exception is unnecessary. The lawyers were confident that such an abortion is *never* required to preserve a woman's health. They may be right, though I think not (more on this below). But if so, they are right only for today. Tomorrow, studies may show that, yes,

there indeed are cases where a "partial birth" abortion is necessary to protect the mother's health, as many physicians believe. Tomorrow, then, these two statutes may be unconstitutional even by the lights of the majority opinion. Why would a state risk the early obsolescence of its statute by making it wholly dependent on ever-changing medical opinion, when to avoid this risk it need only have excepted those "partial birth" abortions, if any, that are necessary to protect the woman's health? If there are few such cases, the exception will rarely be invoked; if none, never.

The answer is that opponents of abortion do not think there should be an exception for abortions that endanger a woman's health. Life, yes, but not health. These statutes, remember, are not concerned with saving fetuses, with protecting fetuses from a particularly cruel death, with protecting the health of women, with protecting viable fetuses, or with increasing the Wisconsin population (as intimated, surely not seriously, by Wisconsin's counsel). They are concerned with making a statement in an ongoing war for public opinion, though an incidental effect may be to discourage some late-term abortions. The statement is that fetal life is more valuable than women's health.

I do not deny the right of legislatures to enact statutes that are mainly or for that matter entirely designed as a statement of the legislators' values. *Milner v. Apfel*, 148 F.3d 812, 814 (7th Cir. 1998). Nothing in the Constitution forbids legislation so designed. Many statutes are passed or, more commonly, retained merely for their symbolic or aspirational effect. But if a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue. The statutes before us endanger pregnant women--and not only pregnant women who *want* to have an abortion. There is no exception for women whose physicians tell them you *must* have an abortion or die. It is

true that if a "partial birth" abortion is necessary to save the woman's life, the statutes permit this. But if her life could be saved by another type of abortion, even one that threatened her health--that threatened to sterilize her or to paralyze her--then the physician would be committing a felony if he performed a "partial birth" abortion. I cannot believe that my colleagues would think the physician could be punished in such a case, and I wonder therefore why the "precautionary" injunctions do not extend to it. The statutes allow a "partial birth" abortion to be performed if "no other medical procedure would suffice for that purpose" (that is, saving the mother's life). Wis. Stat. § 940.16(3); 720 ILCS 513/10. Could not "would suffice" be interpreted to mean "would be as good as from the standpoint of the woman's health"? Such an interpretation, no more audacious than the interpretive leaps that underlie the order to enter "precautionary" injunctions, would seem compelled by the court's own reasoning, but goes unremarked. If the interpretation is rejected, it would imply that a D & X would be forbidden even if the only alternative were a hysterectomy. That can't be right.

The court points out that it is unclear how many women are endangered by these statutes. The forbidden procedure is performed only (or almost only) in late-term abortions, which fortunately are rare; and only in some unknown fraction of them is a "partial birth" abortion the medically preferable procedure. But government cannot without a reason forbid a person to obtain medical treatment and if challenged defend by pointing out that most people don't need that treatment. In the context of abortion this principle is implicit in the statement in *Planned Parenthood of Southeastern Pennsylvania v. Casey, supra*, 505 U.S. at 878, that "purpose or effect" (emphasis added)--and thus purpose alone--"to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability" condemns an antiabortion statute. E.g., *Okpalobi v. Foster*, No. 98-30228,

1999 WL 728396, at *16-20 (5th Cir. Sept. 17, 1999); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116-18 (10th Cir. 1996). That is no constitutional novelty; statutes that burden other constitutional rights besides the right of abortion have been invalidated on the basis of improper purpose. E.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987). The *Casey* opinion speaks of placing a substantial obstacle in the path of "a woman," not "many women." Imagine a married woman, pregnant, told by her physician that her life depends on her obtaining an abortion. He tells her it would be better from the standpoint of minimizing the risk to her of medical complications from the abortion for her to have a D & X. But, he adds, unfortunately the law prohibits the procedure. It does so not because the procedure kills the fetus, not because it risks worse complications for the woman than alternative procedures would do, not because it is a crueler or more painful or more disgusting method of terminating a pregnancy, but because the state wishes to make a statement of opposition to constitutional doctrine. A legislature may be taken to intend any consequences of its handiwork that are at once natural, highly probable, and wholly foreseeable (and foreseen). Here the intent is to block a woman from seeking an abortion when her doctor advises her that the best procedure for her is criminal.

The statutes' improper purpose is further shown by the terminology they employ. The Wisconsin statute defines a fetus from the moment of conception to the moment of birth as a "child" (thus absurdly implying that when we are born we are no longer children). The Illinois statute defines the fetus, also from the moment of conception, as an "infant." If these definitions are sound, *all* abortion is infanticide, which is not the Supreme Court's view. A state cannot be permitted to abrogate federal constitutional rights by definition. Line drawing is inescapable but the line between feticide and infanticide is birth. Once the baby emerges from the mother's body, no possible concern for the mother's life or

health justifies killing the baby. But as long as the baby remains within the mother's body, it poses a potential threat to her life or health and this threat presents a compelling case (or so at least the Supreme Court believes) for a right of abortion. The Wisconsin statute, whose provision for life imprisonment already marks it as the crazier one, also allows either of the fetus's grandparents to sue in respect of a "partial birth" abortion. One can imagine a father who cares more for having a grandchild than he cares for the health of his daughter threatening to sue in order to block a "partial birth" abortion, while the mother (who may be divorced from the father), valuing the situation differently, sits on the sideline, helpless to protect her daughter.

In concluding that the challenged statutes do not pose any threat to women's health, the court relies heavily on tendentious factfindings by the district judge in the Wisconsin case. He fastened on the fact that a Dr. Harlan Giles believes that the D & X procedure is rarely, maybe never, necessary for the protection of the pregnant woman's health. The judge brushed aside the contrary testimony of reputable physicians--more reputable, perhaps, as we're about to see, than Dr. Giles. Giles's testimony is essentially the only basis of the judge's finding, and the judge's finding is the principal basis on which this court, disregarding the contrary findings in the Illinois case, dismisses concerns about the absence of a health exception. Yet apart from everything else, Judge Shabaz's opinion is internally contradictory. He acknowledged that the D & X procedure, being quicker and easier to perform on fetuses that are more than 18 weeks old, has advantages for the woman's health in reducing the amount of bleeding, the risk of uterine perforations, and the amount of time that she has to be under anesthesia. *Planned Parenthood v. Doyle*, 44 F. Supp. 2d 975, 979 (W.D. Wis. 1999). Yet without retracting these findings, he concluded that the procedure is never necessary to protect the woman's health.

I daresay reputable physicians can be found who believe that surgery is never necessary in a case of prostate cancer, or that all vitamins are worthless, or that no efforts should be made to resuscitate a person over 80 years old who experiences cardiac arrest, since he is quite likely to be "revived" to a vegetative state. Dr. Giles may not even be wholly reputable. Another district judge rejected his testimony in opposition to the D & X procedure because, among other reasons, Giles was "more focused on the political aspects of the abortion debate than on the medical questions essential to resolution of the issues presented in this action. And, Dr. Giles was evasive when responding to questions directed at crucial issues in the case. Hence the testimony of Dr. Giles was neither credible, reliable nor helpful." *Richmond Medical Center for Women v. Gilmore*, 55 F. Supp. 2d 441, 1999 WL 507453, at *7 (E.D. Va. 1999) (footnote omitted). Another district judge criticized Giles--who appears to be a member of that much-criticized fraternity, the professional expert witness--for pronouncing on an abortion statute with which he was unfamiliar. *Evans v. Kelley*, 977 F. Supp. 1283, 1309-10 (E.D. Mich. 1997). Another rejected his testimony that the D & X is "a resurrection of an obstetric method discarded in the 1960s, which was used to deliver dead fetuses, and known as craniotomy," and concluded that Giles's criticisms of the D & X procedure were "not persuasive." *Women's Medical Professional Corp. v. Voinovich*, 911 F. Supp. 1051, 1070 (S.D. Ohio 1995), aff'd, 130 F.3d 187 (6th Cir. 1997).

Judge Shabaz, his only support the dubious Dr. Giles, stands alone among district judges who have made factfindings concerning the potential benefits of the D & X procedure for women's health. See *Rhode Island Medical Society v. Whitehouse*, No. C.A. 97-416 L, 1999 WL 683846, at *22 (D.R.I. Aug. 30, 1999) (contrary testimony is "unbelievable"); *Richmond Medical Center for Women v.*

*Gilmore, supra,* at *44-45; *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1124-26 (D. Neb. 1998), aff'd, 1999 WL 753919 (8th Cir. Sept. 24, 1999); *A Choice For Women v. Butterworth*, 54 F. Supp. 2d 1148, 1153, 1156-57 (S.D. Fla. 1998); *Hope Clinic v. Ryan*, 995 F. Supp. 847, 852 (N.D. Ill. 1998) (the decision reversed today without regard for the district judge's findings); *Evans v. Kelley, supra,* 977 F. Supp. at 1296; *Women's Medical Professional Corp. v. Voinovich, supra*, 911 F. Supp. at 1070; see also *Causeway Medical Suite v. Foster*, 43 F. Supp. 2d 604, 608, 613-14 (E.D. La. 1999); *Planned Parenthood of Central New Jersey v. Verniero*, 41 F. Supp. 2d 478, 484-85 (D.N.J. 1998). If this court is to give weight to district judges' assessment of the credibility of the physicians who have testified pro or con the D & X procedure, it ought at least to acknowledge that Judge Shabaz is in a minority of one.

In refusing to give any weight to the findings of fact made by Judge Kocoras in the *Hope* case, the court seems to have forgotten that we are reviewing his judgment too. It is not some unrelated case that we are free to ignore on the ground that it is based on a different record from any before us. His findings, made in a proceeding that resulted in the issuance of a permanent injunction against the Illinois statute, are entitled to as much weight as Judge Shabaz's, *Knapp v. Northwestern University*, 101 F.3d 473, 478 (7th Cir. 1996); *Durasys, Inc. v. Leyba*, 992 F.2d 1465, 1471 (7th Cir. 1993)--more, really, because they are not infected by the internal contradiction that weakens Judge Shabaz's findings. If those findings justify our upholding the Wisconsin statute, Judge Kocoras's should lead us to invalidate the Illinois statute.

The court denies that Judge Kocoras *made* findings. I don't understand this. It is true that he based his findings on affidavits rather than on live testimony, but the state did not challenge the facts contained in the affidavits, including the facts about the medical advantages of the D & X procedure.

Findings do not lose weight by being based on uncontested facts; admissions are not weaker evidence than facts found after vigorous contest. And if it were true that there were no findings in the Illinois case, this would call for a remand; it would not entitle us to plug Judge Shabaz's findings into a separate litigation with no common parties. (What kind of transplant is *that*?)

Consistent deference to district court factfindings in this pair of cases would lead to an inconsistent result--the upholding of one statute and the condemnation of its sister. This demonstrates that the constitutional right of abortion cannot be made to depend on whether a particular district judge finds a particular physician who disagrees with the consensus of medical opinion to be more credible than the spokesmen for the consensus. The consensus here is found in the statement by the American College of Obstetricians and Gynecologists (ACOG) that the D & X procedure "may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman, and only the doctor, in consultation with the patient, based upon the woman's particular circumstances can make this decision." As Judge Shabaz himself acknowledged, the procedure reduces the risk of lacerating the uterus and the cervix with the sharp instruments used in the standard D & E. Such lacerations cause trauma and loss of blood. The D & X also reduces the risk that fetal tissue will remain in the woman's body, where it can cause infection. It reduces the length of time that the woman is under anesthesia. And it facilitates testing for genetic abnormalities, which is particularly important to the woman's decision whether to become pregnant again. (So much for the suggestion of Wisconsin's lawyer that banning the D & X will lead to more births.) Not all physicians agree with these points; and ACOG hedged its opinion by noting that a select panel of physicians had been unable to identify specific circumstances in which there is no satisfactory alternative to a D & X. But

the team of Dr. Giles and Judge Shabaz are, with all due respect, not competent to resolve this medical controversy.

How often the circumstances sketched in the previous paragraph that led ACOG to recommend retention of the D & X as a treatment option in late-term abortions will be present is not critical. It is slight consolation to be told that while the state has forbidden the optimal treatment of your medical problem, that problem happily is rare. Although we haven't been told of cases in states that have enacted laws forbidding "partial birth" abortion that were not promptly enjoined in which the consequence has been to endanger women, for all we know women in those states go out of state if they are candidates for a D & X. Cf. *Jane L. v. Bangerter, supra*, 102 F.3d at 1117. That would be the prudent course. My colleagues in the majority perform their own statistical analysis, outside the record, in an effort to refute this possibility. I have no objection to a court's relying on extra-record evidence to determine the health effects of "partial birth" abortion. Those effects should indeed be treated as a legislative fact rather than an adjudicative fact, in order to avoid inconsistent results arising from the reactions of different district judges, sheltered by the deferential "clear error" standard of appellate review of factfindings, to different records--the inconsistency illustrated by the different findings of Judges Shabaz and Kocoras in the two cases before us. Even so, we should hesitate to play statistician. It is incongruous for this court to brush aside the findings of district judges in other cases while bolstering Judge Shabaz's inadequate findings with extra-record evidence of its own.

The court tries to shore up Judge Shabaz's findings with two medical papers. One of these, however, Nancy G. Romer, "The Medical Facts of Partial-Birth Abortion," 3 *Nexus: A Journal of Opinion* 57 (1998), is not a medical paper at all. Although the author is an M.D., she is also a

pro-life activist, and the burden of her paper is that viable fetuses should be saved rather than aborted. This is a respectable ethical stance but it has nothing to do with the medical pros and cons of a D & X. The other paper, M. LeRoy Sprang & Mark G. Neerhoff, "Rationale for Banning Abortions Late in Pregnancy," 280 *JAMA* (*Journal of the American Medical Association*) 744 (1998), appears in a section of *JAMA* captioned "controversies," and though it does point out possible dangers to the woman from the procedure, the authors are heavy on the ethical issues involved in abortion. Like Dr. Romer, they come out in opposition to late-term abortion by any method, and opine very unscientifically that "partial birth" abortion is "closer to infanticide than it is to abortion." *Id.* at 746. Another medical article in the same issue of *JAMA* concludes that the D & X procedure should, as ACOG concluded, be an option for the physician. See David A. Grimes, "The Continuing Need for Late Abortions," 280 *JAMA* (*Journal of the American Medical Association*) 747 (1998). The court does not cite that article.

No hypothesis has been proposed by either of the states, or by the *amici curiae* who have submitted briefs in support of the Wisconsin statute, as to why physicians would perform, or the American College of Obstetricians and Gynecologists support, a method of abortion that benefits no patient. There has been no suggestion of any pecuniary incentive that might cause them to engage in a controversial procedure of this kind.

Apart from performing its own statistical analysis and bringing to bear so-called medical papers, the court evinces its queasiness about resting entirely on Judge Shabaz's findings by saying that "the question in the end is not what one or another judge found on a given record" (the question the court had spent so much time discussing). "It is enough that there is real, and not just hypothetical, support for a

belief that the partial-birth-abortion laws do not pose hazards for maternal health." This sounds suspiciously like the test for whether a statute has a rational basis, see, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993), and so may explain the court's one-sided treatment of the facts (the failure to cite Dr. Grimes's paper, for example). Rational basis is not the issue here. The issue is whether the Wisconsin and Illinois "partial birth" statutes impose an undue burden, and specifically whether they are a threat to maternal health. That is rightly an issue of legislative fact, meaning that its resolution is not to be cabined by facts determined in an adjudicative hearing; still it must be resolved in accordance with the weight of the evidence, including such extra-record evidence as the consensus of the relevant expert community, in this case the medical community. It is not enough to note that there is some evidence in support of one side of the issue, when there is more evidence on the other side. In the case the court cites as illustrating the appropriate scope of review, *Craig v. Boren*, 429 U.S. 190, 199-204 (1976), the Supreme Court critically reviewed statistical evidence underlying the claimed constitutionality of the challenged statute--and found it wanting. When one critically reviews the testimony of Dr. Giles, and the court's own statistical analysis, and the so-called medical papers, and weighs them against the evidence that establishes the medical consensus, it becomes apparent that the court does not take the standard of *Craig* seriously.

Let me suggest an analogy. Suppose that a legislature in the South in the 1950s had listened to several "reputable" cognitive psychologists testify that blacks as a group are slow learners, and hence that they should be educated in separate schools. No one would argue that this legislative finding, because supported by some evidence from the relevant expert community, would have to be accepted in deciding the constitutionality of segregated education. The court, if it thought the issue relevant, would have to decide whether the

finding was correct before relying on it. Similarly, the Wisconsin and Illinois legislatures are not entitled to ban an abortion procedure that the medical community believes may be preferable from a medical standpoint for some women, simply because a marginally reputable expert (Dr. Giles) thinks that the set of women for whom the procedure is preferable is actually zero. That might bear on the legislatures' good faith (though there is contrary evidence on that too, as I have pointed out), but it would not decide the issue of the statutes' effects on the right of abortion.

Enough said: banning the D & X, the core prohibition in these statutes, imposes an undue burden on women who seek to have an abortion, and is therefore unconstitutional. Let me turn now to the alternative ground of vagueness. Both statutes forbid the partial vaginal delivery of a living fetus, and this describes many instances of the D & E method of abortion--which the court acknowledges cannot constitutionally be banned, see also *Carhart v. Stenberg*, Nos. 98-3245 NE, 1999 WL 753919 (8th Cir. Sept. 24, 1999); *Little Rock Family Planning Services, P.A. v. Jegley*, No. 99-1004 EA, 1999 WL 753928 (8th Cir. Sept. 24, 1999); *Planned Parenthood of Greater Iowa, Inc. v. Miller*, No. 99-1372 SI, 1999 WL 753770 (8th Cir. Sept. 24, 1999)--as well as it does the D & X. Judge Shabaz himself acknowledged that "often" in the course of a D & E there is a fetal heartbeat after portions of the fetus have been delivered into the vagina, 44 F. Supp. 2d at 977, making the D & E definitionally a "partial birth" abortion under both statutes. The court's response, as I noted at the outset of this dissent, is not to hold that the statutes are unconstitutionally vague, but instead to hold that they can't be enforced against any procedure except the D & X until the Wisconsin and Illinois state courts have had a chance (the chance that is unlikely ever to come) to "interpret" their statutes to permit the standard D & E method even when it results, as it frequently does, in the partial vaginal delivery of a living fetus.

Putting to one side my objections to the court's procedure, which I discussed at the outset of this dissent, I note that the court seems to have bought into the legal-realist view that a statute means whatever the courts say it means, despite the Supreme Court's admonition that a court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884 (1997), and cases cited there. If the realists are right, and the contrary intimations of cases such as *Reno v. American Civil Liberties Union* can be brushed aside, I wish the court would, as I suggested earlier, hold that these statutes can be further narrowed by "precautionary" injunction to make an exception for cases in which the D & X procedure is necessary to protect the woman's health. The interpolation of such an exception would be no greater act of judicial *hubris* than narrowing the statute to the D & X when the draftsmen of the statutes decided not to use that term, preferring a vaguer term intended to be broader.

The constitutional law of vagueness is obviously in turmoil and so I shall suggest a lowest common-denominator approach with which I think few judges will disagree, however much they may disagree about its application to particular cases. If a criminal statute is so worded that it is highly likely to condemn a constitutionally privileged act, and if the constitutionally privileged actor could not as a practical matter avoid being punished for engaging in such an act by raising a defense in a criminal proceeding, then the statute is enjoinable, in advance of any prosecutions, as unconstitutionally vague. For the very existence of such a statute "deters constitutionally protected activity." *Coe v. County of Cook*, 162 F.3d 491, 496 (7th Cir. 1998), and cases cited there. When vague statutes prescribe heavy penalties for their violation, rational people avoid any conduct that might be thought to fall within the statute's scope, even if in

an error-free litigation the conduct would be sure to be found constitutionally protected. See, e.g., *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., supra*, 455 U.S. at 494 n. 6; *Colautti v. Franklin*, 439 U.S. 379 (1979); *Charles v. Daley*, 749 F.2d 452, 460 (7th Cir. 1984).

When the demanding conditions that I have outlined are satisfied, the statute is invalid, and the legislature has to go back to the drawing board. The court cannot rewrite the statute, or tell the state courts how to rewrite it, and, in advance of any further interpretation, uphold the rewritten statute. That procedure, the procedure followed by the court today, in effect nullifies the doctrine of unconstitutional vagueness.

These statutes are either absurdly (and unlawfully) overbroad or remarkably vague, and the court's direction to issue "precautionary" injunctions is a tacit acknowledgement of its inability to give the statutes a plausible narrowing interpretation; the confused concessions of the states' lawyers at the oral argument were no help in the endeavor. Although the statutes are addressed to physicians--it is their conduct alone that is regulated--the language employed is not medical language. Instead of denoting the victim of illegal abortion as a live fetus, a fetus with a heartbeat, or a viable fetus (a fetus, remember, that can survive outside the mother's body), the Illinois statutes refers to "a living human fetus or infant," terms that the statute explains are "used interchangeably to refer to the biological offspring of human parents," 720 Il CS 513/5, while the Wisconsin statute refers to "a living child" or "partially delivered child," with "child" defined, as I noted earlier, as "a human being from the time of fertilization until it is completely delivered from a pregnant woman." Wis. Stat. §§ 940.16(1)(a), (b). The use of such language makes the statutes incurably ambiguous. Neither "biological offspring" nor "living" is defined. At argument the Solicitor General of Illinois was emphatic that

"biological offspring" is a synonym for "intact fetus," that is, a fetus (however deformed) before the physician performing the abortion begins to work on it. But he retreated from this position when faced with the hypothetical case of a physician who, intending to perform a D & X, removes a limb or other part of the fetus before beginning the procedure. His retraction was consistent with his statement that the Illinois legislature had tried to make the statute "as broad as possible." More extensive dismemberment than merely removing a limb or two, Wisconsin's lawyer assured us, would inevitably kill the fetus before any part of it emerged from the uterus. She offered no basis for this hopeful bit of medical advice, and it is wrong. *Carhart v. Stenberg*, *supra*, at *4; *Richmond Medical Center for Women v. Gilmore*, *supra*, at *10. By "killing" the fetus, she evidently meant doing something to cause its heart to stop beating, although a fetus is living before it develops a heart. Obviously a one-day old embryo, like the cells that compose a living human body, is alive, not "dead."

In a standard D & E, part or all of the fetus often will still have a heartbeat, and so be "living," in the sense of the word apparently intended by the legislatures, when it emerges from the uterus. Therefore it is "partially vaginally delivered," just as in a D & X. "During the D & E procedure, the fetus may be removed from the uterus and brought through the cervix and vagina either intact or disarticulated. . . . It may happen that part of the intact fetus will be in the vagina and part in the uterus or a disarticulated part of the fetus will be in the vagina while the remainder of the fetus is in the uterus. In either of these situations, that part of the fetus which remains in the uterus may still have a heartbeat." *Planned Parenthood of Central New Jersey v. Verniero*, *supra*, 41 F. Supp. 2d at 484. If the physician then kills the fetus, he would, one would think, be guilty of having violated these statutes, which punish the killing of a fetus that has been partially vaginally delivered.

Against this interpretation, the Illinois Solicitor General, discarding settled principles of criminal law for the sake of a short-term victory, declared that the statute would not be violated unless the physician had *planned* before beginning the abortion to wait until a part of the fetus had emerged from the uterus and kill the fetus then; the mere fact that the physician knew it was likely that a part of the fetus would be outside the uterus at the moment of death would not show the requisite intent. By this logic--which the state's Solicitor General actually embraced at argument--if you fire a machine gun into a lighted college dormitory at night, reckoning that you have only a 10 percent chance of actually killing anyone, and you do kill one or more of the residents, you are not guilty of murder, provided you didn't want to kill anyone but just wanted to see whether your machine gun was in working order. The law is otherwise. First-degree murder in Illinois requires only that "in performing the acts which cause the death" the defendant "knows that such acts create a strong probability of death or great bodily harm." 720 ILCS 5/9-1; *People v. Daniels*, 702 N.E.2d 324, 330-31 (Ill. App. 1998); *People v. Mitchell*, 601 N.E.2d 916, 919 (Ill. App. 1992); *Hennon v. Cooper*, 109 F.3d 330, 333-334 (7th Cir. 1997). A physician who performs a standard D & E knowing, as he must, before he begins, that part of the fetus is quite likely to be outside the uterus when he kills the fetus, and then kills it after a part has emerged from the uterus, is guilty of the crime of partially vaginally delivering a living fetus and then killing it.

The Illinois statute itself, moreover, requires only that the partial-birth abortion have been performed "knowingly." 720 ILCS 513/10. Under the law of Illinois, a defendant is deemed to know "the result of his conduct, described by the statute defining the offense, when he is consciously aware that such result is practically certain to be caused by his conduct." 720 ILCS 5/4-5(b).

Wisconsin authorizes life imprisonment for performing a "partial birth" abortion. That is the state's heaviest penalty, the penalty for murder. Wisconsin deems its statute--as both the penalty and the use of the term "child" to denote the fetus reflect--a law against infanticide. (So does Illinois, by using the term "infant," but it is not serious, because the maximum punishment for killing the "infant" is only three years.) No one would suppose, in the example of shooting into a dormitory, that if only a one-day-old baby were killed the killer would be innocent of murder. If Wisconsin is serious in regarding a fetus that has begun to emerge from the uterus as "a living child" who should be protected to the full extent of the law against murder, it cannot rationally interpret the statute to permit the physician to escape punishment by the plea that when he began the abortion he thought there was only a 50 percent chance that he would be killing "a living child." It would be like arguing that if a nurse hit a newborn over the head with a baseball bat, with all her might, not to kill it but merely to make it stop crying, and the newborn died, the nurse could defend against a charge of first-degree murder by proving that while she thought it quite possible that the newborn would die, she didn't want it to die and thought it had a 50 percent chance of surviving.

Any doubts on this score are stilled by Wisconsin's statutory definition of intentional. The statute punishes "intentionally" performing a partial birth abortion, Wis. Stat. § 940.16(2), and the term means either acting purposely to accomplish the forbidden end *or* being "aware that [one's] conduct is practically certain to cause that result." Wis. Stat. § 939.23(3). As glossed by the case law, the alternative definition is satisfied by conduct carrying a known high risk of the forbidden result even if that result is not desired. See *State v. Gould*, 202 N.W.2d 903, 906 (Wis. 1973); *State v. McCarter*, 153 N.W.2d 527, 529 (Wis. 1967); *State v. Webster*, 538 N.W.2d 810 (Wis. App. 1995). In *Webster*,

where the defendant was convicted of attempted first-degree murder, it was deemed irrelevant that the jury might have accepted his testimony "that he precisely aimed the shotgun at Hood's armpit, and that the gun was loaded only with shotshells filled with bird shot." 538 N.W.2d at 815.

So the state-of-mind requirements of the two statutes turn out to be the same. They are, moreover, the standard state of mind requirements for liability for serious crimes. A criminal defendant acts intentionally, and, even more clearly, knowingly, "when he knows that that result [here, a "partial birth" abortion] is practically certain to follow from his conduct, whatever his desire may be as to that result." 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 3.5, p. 304 (1986); see, e.g., *United States v. United States Gypsum Co.*, 438 U.S. 422, 444-46 (1978); *Smith v. Farley*, 59 F.3d 659, 663 (7th Cir. 1995); *United States v. McAnally*, 666 F.2d 1116, 1119 (7th Cir. 1981).

I have discussed the state of mind requirements of these statutes at such length in order to make clear how little mileage the court can get from the cases that it cites, such as *Screws v. United States*, 325 U.S. 91 (1945), that save vague statutes by narrow interpretations. Put aside the fact that these were federal statutes given narrowing interpretations by federal courts, rather than state statutes given narrowing interpretations by federal courts, and that the Supreme Court in *Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976), a decision that is still good law on this point, held that the proper way to obtain a narrowing interpretation of a vague state abortion statute is to abstain in favor of the state courts. The point I wish to stress is that the device used in *Screws* and many similar cases to save the statute, that of interpolating a *scienter* requirement, is unavailable here. And this for two reasons. The first is that the Wisconsin and Illinois statutes make clear what the state of mind requirement for guilt under each statute is, leaving no room for interpolating such a

requirement in the guise of interpretation; and the second is that the problem with knowing what these statutes require of a physician is not ignorance of legal obligation, but ignorance of the factual premises of liability. The statute challenged in *Screws* made it a crime to deprive a person of a constitutional right. The Court held that the statute could be saved by requiring that the defendant be shown to have *known* that he was violating a constitutional right. It was a realistic requirement because the set of constitutional rights at any moment is more or less known and it is a straightforward (though not always easily answerable) factual question whether the defendant knew that his conduct infringed something in that set. No one knows what procedures constitute "partial birth" abortion, and specifically whether many, perhaps most, D & E's do, given that the fetus often has a heartbeat after part of the fetus has emerged from the uterus. Screws, when he beat his victim to death, knew that he was committing the assault; the question was whether he knew that the assault (because he was a sheriff and his victim an arrestee) violated the Constitution. Physicians performing late-term abortions in Illinois and Wisconsin do not know whether they are performing "partial birth" abortions and thus committing crimes.

The incurable vagueness of these statutes might seem to be of little moment if a physician prosecuted for infanticide or feticide had a sure defense should the prosecution stray beyond the narrow path to which the court today attempts to confine the statute. He could not avoid prosecution but at least he would know he would be acquitted, and if he were lucky he would be let out on bail pending trial and maybe Planned Parenthood would pay his legal fees. But let us be realistic, and not only about the possibility of legal error. The physician is not the real target of the statute; the pregnant woman is. It is not the physician's pregnancy that is to be terminated. He has no incentive to undergo the agony of a criminal prosecution merely in order to perform

an abortion in a particular way. Better for him either to abandon late-term abortions altogether, or to be sure to give the fetus a lethal injection in utero, and wait for it to take effect, before performing the abortion. The *in terrorem* effect of these statutes, especially the Wisconsin statute with its maximum penalty of life imprisonment, is likely to induce physicians in these states to steer well clear of the forbidden zone. What physician would be fool enough, or hero enough, to risk a criminal prosecution in order to explore the precise meaning and outer bounds of the precautionary injunctions that this court has ordered the district courts in these two cases to enter, even if the risk is small?

And now we can see more clearly one of the fallacies in the "precautionary" injunction gimmick. It is the existence of these statutes, because of their extraordinary breadth and the limited incentive of a physician to test their scope, not the risk of prosecution, which may indeed be slight, that burdens those abortion rights that are conceded to be constitutionally protected. A peculiarity of abortion rights is that they require the assistance of a third party, the physician, who has a lesser interest in them than his patient. Because his interest is less, he is more easily deterred, and this should increase our concern with the deterrent effects of these vague statutes.

It remains only to make clear that in finding these statutes pernicious and unconstitutional I do not mean to criticize anyone who believes, whether because of religious conviction, nonsectarian moral conviction, or simply a prudential belief that upholding the sacredness of human life whatever the circumstances is necessary to prevent us from sliding into barbarism, that abortion is always wrong and perhaps particularly so in late pregnancy, since *all* methods of late-term abortion are gruesome. If a woman told by her physician that her fetus will be a Down's baby or a Tay-Sachs baby or will be born without arms or legs, or that her own health or even life will be endangered if she carries the

fetus to term, decides nevertheless against abortion, I would be the last to criticize her decision. I might consider her a heroine or a saint. But what is at stake in these cases is whether the people who feel that way are entitled to coerce a woman who feels differently to behave as they would in her situation. The Constitution as interpreted by the Supreme Court in decisions that we are not free to palter with answers this question "no." We should therefore affirm the district court's decision in *Hope* and reverse the district court's decision in *Doyle*.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PLANNED PARENTHOOD OF WISCONSIN, GARY T. PROHSKA, M.D., FREDRIK F. BROEKHUIZEN, M.D., GAVIN JACOBSON, M.D., NEVILLE SENDER, M.D., DENNIS D. CHRISTENSEN, M.D. and BERNARD SMITH, M.D., on behalf of themselves and their patients seeking abortions,

Plaintiffs,

v.

JAMES E. DOYLE, in his official capacity as the Attorney General of the State of Wisconsin and DIANE M. NICKS, in her official capacity as District Attorney for Dane County and as representative of a class of all District Attorneys in Wisconsin,

Defendants.

MEMORANDUM and ORDER
98-C-305-S

At issue in this matter is the constitutionality of 1997 Wisconsin Act 219, codified at Wis. Stat. §§ 895.038 and 940.16 (the "Act").

The Act forbids any person from intentionally performing a "partial-birth abortion." Wis. Stat. § 940.16(2). It defines "partial-birth abortion" as "an abortion in which a person partially vaginally delivers a living child, causes the death of the partially delivered child with the intent to kill the child, and then completes delivery of the child." Wis. Stat. § 940.16(1)(b). "Child" is defined as a "human being from the

time of fertilization until it is completely delivered from a pregnant woman." Wis. Stat. § 940.16(1)(a). The Act provides an exception to its criminal sanction where a partial-birth abortion "is necessary to save the life of a woman whose life is endangered by a physical disorder, physical illness, or physical injury . . . if no other medical procedure would suffice for that purpose." Wis. Stat. § 940.16(3). Violation of the Act is a class "A" felony under Wisconsin law, subjecting violators to life imprisonment.

The Act also creates civil liability for its violation. It authorizes the father of the child aborted by the partial-birth abortion and, if the woman on whom the abortion was performed is a minor, either of her parents, to sue for damages. Wis. Stat. § 895.038(2)(a). Either may sue regardless of whether the woman consented to the partial-birth abortion. However, neither may sue if he or she consented to the partial-birth abortion. Wis. Stat. § 895.038.

In its enactment the Wisconsin legislature rejected proposed amendments, Exhibits 1 - 15.

**Procedural History**

Plaintiffs previously sought a preliminary injunction against enforcement of the Act which this Court denied. *Planned Parenthood v. Doyle*, 9 F. Supp. 2d 1033 (W.D. Wis. 1998). On the basis of undisputed facts, the Court found that (1) the Act could be narrowly construed to apply only to the dilation and extraction ("D&X") method of abortion, (2) the scienter requirements in the law helped save it from a vagueness challenge, and (3) the Act did not place an undue burden on a woman's right to choose an abortion. Accordingly, the Court found that plaintiffs had failed to establish a likelihood of success on the merits.

The Court of Appeals disagreed. *Planned Parenthood v. Doyle*, 162 F.3d 463 (7th Cir. 1998). It found that plaintiffs might succeed in proving the Act unconstitutional for any of three reasons. First, the Act makes no exception for cases in which the fetus is not yet viable at the time of the abortion. *Id.* at 466. Second, the Act contains no exception for cases in which a D&X procedure is necessary for the preservation of the mother's health. *Id.* at 467. Third, the Act is vague. *Id.* at 469.

The Court of Appeals specifically noted that its opinion was based on the record compiled at the time and that "the full trial may cast the facts in a different light." *Id.* at 466. Accordingly, a trial was held in this matter to determine whether the evidence presented by the parties would continue to justify the Court of Appeals' concerns regarding the constitutionality of the Act.

**Findings of Fact**

Based on the evidence presented at trial and those facts to which the parties have stipulated, the Court makes the following findings of fact. These findings may be divided into three parts according to the issue they primarily address. In the first group is evidence relating to the vagueness of the Act -- whether the Act can be construed to apply to any procedure other than the D&X procedure. In the second group is evidence relating to the impact of the Act -- whether its purpose or effect is to place an undue burden on a woman's right to an abortion. In the third group is evidence relating to the state interests served by the Act.

The Court will present its factual findings according to this division of the relevant evidence. The facts to which the parties have stipulated are accepted as true except to the extent they conflict with the following findings.

**Vagueness** -- The following facts are relevant to the issue of whether the Act is unconstitutionally vague.

The most commonly used methods of abortion are suction curettage, dilation and evacuation ("D&E") and induction. Some physicians also use the dilation and extraction ("D&X") method of abortion.

In a suction curettage procedure, the physician generally dilates the cervix, inserts a tube (cannula) through the vagina and the cervix into the uterus, and removes the embryo or fetus and other products of conception through the cannula while it is inside the vagina, cervix, and uterus.

Abortion by induction involves inducing preterm labor. The physician uses laminaria to dilate the cervix and introduces medications into the patient that will both continue the dilation and induce labor. As a result of the labor, the fetus is expelled from the woman's uterus.

In a D&E procedure, the physician generally dilates the cervix by inserting laminaria. When sufficient dilation is achieved, the physician removes the laminaria and ruptures the amniotic sac. Depending on the gestational age and the size of the fetus and the amount of dilation achieved, the physician may use suction to remove the parts of the fetus and products of conception that are removable by suction. The physician will then insert forceps into the woman's uterus in order to grasp and remove the remaining parts of the fetus from the uterus through the cervix into the vagina and then from the woman's body. This process involves dismemberment of the fetus and repeated insertions of the forceps into the woman's uterus to grasp and remove remaining fetal parts. During an abortion performed in this manner, there often is fetal cardiac activity and other signs of life after a fetal part has been delivered into the vagina while the remainder of the fetus is in utero.

Plaintiffs Christensen and Smith define the D&X procedure as follows:

> In the intact D&E procedure (which is also known as "dilation and extraction," "D&X" or "intact D&X"), the physician dilates the cervix and then removes the fetus from the uterus through the vaginal canal intact. The physician extracts the fetal body intact, usually feet first, until the cervix is obstructed by the after coming head, which is too large to pass through the cervix. Then the physician creates a small opening at the base of the skull and evacuates the contents, allowing the calvarium to pass through the cervical opening. The intentional removal of the fetus intact is what distinguishes an intact D&E procedure from a D&E procedure.

Similarly, the American College of Obstetricians and Gynecologists ("ACOG") defines the D&X procedure to include the following steps:

> 1. deliberate dilation of the cervix, usually over a sequence of days;
> 2. instrumental conversion of the fetus to a footling breech;
> 3. breech extraction of the body excepting the head; and
> 4. partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus.

Dr. Broekhuizen agrees with this definition but would define D&X more broadly to include other variations on the technique, including crushing the skull to allow it to pass through the cervix. Haskell agrees that how the skull is reduced in size is not an important distinction. He stated that

"the medical distinction between a D&E and a D&X is the extent to which the surgeon attempts to extract portions of the fetus intact." Ex. 227 at 8.

Haskell also testified that in perhaps 75% of the D&X procedures he performs, he cuts the umbilical cord before removing the fetus from the uterus. However, sometimes the child is partially delivered before he cuts the umbilical cord. Haskell stated that the child is likely to die within minutes after Haskell cuts its cord.

As evidenced by the policy statements of the American Medical Association (Ex. 17) and the American College of Obstetricians and Gynecologists (Ex. 16) as well as articles published in prominent medical journals (Exs. 205, 206, 207 and 240), the medical community understands the phrase "partial birth abortion" to refer to the dilation and extraction or "D&X" procedure. *See also* Ex. 239 at 35 ("The breech extraction variation of intact D & E, described in the lay press as 'partial birth abortion' has been made illegal in several states.") Nevertheless, the plaintiff physicians state that they find the definition of partial birth abortion in the Act to be vague because the definition could be construed to cover the three most common methods of abortion including suction curettage, induction, and dilation and evacuation ("D&E"). *See* Plaintiffs' Proposed Finding of Fact No. 24. They expressed concern over the following situations:

> **Suction Curettage** -- Occasionally, in some suction curettage procedures, it is necessary for the physician to use forceps to remove the fetus from the uterus. Sometimes the physician removes the fetus in parts and other times it is intact. When the fetus is intact, there may be a point in the procedure when part of the fetus is outside of the uterus while the rest of the fetus remains in the uterus.

**Induction** -- Sometimes during an induction the physician must assist in the removal of the fetus; and sometimes the physician collapses or compresses the skull or some part of the fetal abdomen to allow it to pass through the cervix.

**D&E** -- In some D&E procedures, a physician draws part of the intact fetus partially through the cervix and into the vaginal canal. After the grasped part has come through the cervix the physician disjoins the part from the rest of the fetus, which remains in the uterus. Physicians who perform abortions know that disarticulating a fetal limb from a pre-viable fetus will cause the fetus to die within a few minutes.

Trial testimony and the stipulated facts establish that physicians cannot control when a child's death occurs in either the suction curettage or induction methods of abortion. While death of the pre-viable fetus is the ultimate outcome of these procedures, there is no particular step taken in either of these procedures that is practically certain to kill the fetus at an identifiable point in time. Fetal demise occurs at different times and from different causes.

Similarly, when beginning a D&E abortion, a physician cannot predict when the child will die and generally it is not known when a child does die. If the child is alive when dismemberment begins, the physician may be practically certain that dismembering substantial portions of the child will kill the child before delivery of all parts of the fetus is completed. In those circumstances, however, the physician does not complete delivery of a "child." Rather, the physician delivers dismembered body parts.

By contrast, physicians who perform D&X abortions know that crushing the fetal skull or piercing the skull and suctioning the contents will cause the fetus to die immediately or within a few minutes. They take this step

after partially vaginally delivering the child. Accordingly, they are practically certain to kill a child in the birth canal on most occasions. Except for beginning the abortion with an injection that is lethal to the fetus, the piercing or crushing of the skull in a D&X procedure and cutting the umbilical cord, a physician does not intentionally kill the child at any specific point during the procedure.

Accordingly, based on this evidence, the Court concludes that only in the D&X procedure is the physician aware that his conduct is practically certain to kill a living child in the birth canal before completing delivery of the child.

**Undue Burden** -- In addition to the facts already stated, the following facts are relevant to whether the Act imposes an undue burden on a woman's right to choose an abortion.

There are both advantages and disadvantages of the D&X procedure as compared to the D&E procedure. One of the advantages of the D&X procedure is that it is quicker and easier to perform than the D&E procedure after 18 weeks lmp. The shorter procedure time reduces the amount of bleeding and reduces the amount of time that the patient has to be subject to anesthesia. Another advantage is that the physician in the D&X procedure does not have to make multiple insertions of the forceps into the uterus. Reducing the use of instruments in the uterus reduces the risk of uterine perforation.

The D&X also has certain disadvantages in that it creates risks not found in the D&E procedure. The D&X procedure requires greater dilation of the cervix through an additional 24 hours of laminaria. The testifying physicians agreed that delaying an abortion creates additional risks. With regard to the D&X procedure these risks include a risk that the woman's membranes might rupture or that she may develop an infection. The greater dilation used in D&X also poses

the risk of cervical incompetence, which may lead to premature births in future pregnancies.

Also, the D&E procedure has a proven track record that the D&X procedure does not have. D&E is the most common method of second-trimester abortion, accounting for hundreds of abortions in Wisconsin each year. D&X, by contrast, is rarely used. Among the plaintiff physicians, only Christensen regularly performs the D&X procedure and he performs just 2-3 such procedures each year.

There are no published, medically-recognized studies comparing the risks of D&E to D&X. Haskell testified to an informal comparison. He stated that in 10 years of performing abortions he does not recall any complications in the D&X procedures he has performed and recalls perhaps 2-3 complications in the D&E procedures he has performed. His experience conflicts with that of his mentor, Dr. McMahon, as reported in Exhibit 228. McMahon encountered major complications in 4 out of 1362 patients using the D&X procedure. This success rate was no better than for D&E's. The Court places little reliance on any of this anecdotal evidence because there has been no suggestion that the women receiving D&E abortions were similarly situated to the women receiving D&X abortions, or that the complication rates experienced by Haskell and McMahon were statistically significant.

More telling evidence concerning the relative safety of the D&X procedure may be found in the opinions of the testifying physicians. None of the physicians would state unequivocally that the D&X procedure is safer than the D&E procedure. Broekhuizen conceded that further study of the procedures is required. Smith admitted that he had never encountered a situation where D&X would have been the best procedure to use. Haskell, who invented the procedure, admitted that the D&X procedure is never medically

necessary to save the life or preserve the health of a woman. Giles agreed.

Major medical associations are equally reluctant to endorse the D&X procedure. ACOG reviewed the D&X procedure and "could identify *no* circumstances under which [the D&X procedure] would be the only option to save the life or preserve the health of the woman." Ex. 16 at 2. ACOG did state that there "may" be circumstances in which the D&X procedure is the best or most appropriate procedure, but it did not identify what those circumstances might be. *Id.*

Similarly, the American Medical Association concluded that "there does not appear to be any identified situation in which intact D&X is the only appropriate procedure to induce abortion, and ethical concerns have been raised about intact D&X. The AMA recommends that the procedure not be used unless alternative procedures pose materially greater risk to the woman." Ex. 17 at 15. Again, however, the AMA did not identify any particular circumstances in which "alternative procedures pose materially greater risk to the woman." *Id.*

The plaintiff physicians' reluctance to endorse the safety of the D&X procedure is evidenced by their conduct. Actions often speak louder than words, and in this case plaintiffs' conduct indicates that the D&X procedure offers no material advantage in terms of safety. As noted, none of the plaintiff physicians routinely performs the D&X procedure. Nor do they train their staff or medical students to perform the procedure. They also do not routinely inform their patients as to the procedure's availability or its supposed advantages. All of the physicians use the same consent form regardless of the method of abortion used.

The conduct of the other physician witnesses offered by plaintiffs suggests the same conclusion. Haskell invented the

D&X procedure and has demonstrated an unusual fondness for it. Nevertheless, he sometimes chooses to perform a D&E abortion -- despite his alleged concerns regarding its safety -- because the additional delay involved in a D&X procedure would be inconvenient for the woman. Similarly, Stubblefield and his colleagues perform induction abortions at 17 - 20 weeks lmp and do not offer D&X abortions because the added time necessary to dilate the cervix is not worth the benefits of the D&X procedure.

Similarly, plaintiffs' conduct during the two weeks that the Act was in effect provides further evidence concerning the alleged burdens imposed by the Act. Broekhizen conceded that during this period he continued to perform abortions without altering his procedures. Smith effectively conceded the same when he declined to answer a question on this point and invoked his Fifth Amendment rights against self-incrimination. Christensen also continued to perform abortions during this period. He issued a press release stating that he could comply with the Act as he interpreted it only by altering his procedures in a way that would impose greater health risks on women. Nevertheless, Christensen's rate of complications from abortions did not go up in a "statistically significant fashion" while Wis. Stat. § 940.16 was in effect.

Regardless of the general safety of the D&X procedure, plaintiffs argue the procedure is safer in certain circumstances. They contend that in some induction procedures the fetal skull is too large to pass through the cervix and must be crushed in order to complete delivery. Several of the plaintiff physicians admitted that they could wait for the skull to pass the cervix naturally, but they stated that there would be no medical reason for doing so and the delay may lead to excessive bleeding.

Plaintiffs also contend there are certain maternal conditions or fetal anomalies in which the D&X procedure is the best

procedure to use in order to accomplish an abortion. In support of this position they offered the testimony of Dr. Broekhuizen who described three circumstances in which he intended to perform D&X abortions. In the first case, Broekhuizen aborted a pregnancy in a woman with schleroderma. He dilated the cervix through serial application of laminaria and the fetus was completely expelled intact. He did not crush the skull or puncture the skull and suction out the contents.

In the second case, Broekhuizen intended to perform a D&X abortion to terminate the pregnancy of a woman with skeletal dysplasia. He chose the D&X procedure because the woman opposed dismemberment of the fetus through the D&E procedure and had an "inordinate" fear of labor pains so that she did not want an induction. Broekhuizen also wanted to deliver an intact fetus in order to obtain a more definite diagnosis of dysplasia. Despite Broekhuizen's intent to perform a D&X abortion, serial dilation of the cervix led to a spontaneous onset of labor and an intact fetus was delivered.

In the third case, Broekhuizen performed the D&X procedure to abort a fetus 28 weeks lmp with hydrocephalus. Due to this fetal anomaly the head was larger than that of a child carried to term. Broekhuizen performed a combination of dilation and induction, and then decompressed the head with scissors and needles and completed delivery.

Dr. Giles disagreed that the D&X procedure was the best procedure to use in any of these circumstances. Indeed, with 25 years of experience in high risk pregnancies, Giles has never seen a situation where D&X would be the best procedure to use. He deemed induction the safest method in all late-term (20 or more weeks lmp) pregnancies because it does not require instrumentation in the uterus. Accordingly, in his view, induction is safer even than D&E. Moreover,

like D&X, the induction procedure yields an intact fetus which could be studied by physicians and grieved over by mothers.

Giles disputed the need to crush the fetal skull in induction procedures. He routinely uses cervical relaxants and other drugs to allow the fetal head to pass quickly without complications. He also noted that a physician could assist an induction procedure by gently compressing the fetal head without either the intent to kill the fetus or the practical certainty that death of the fetus would be the result.

Giles also stated that D&X is not the best method of abortion where a child has hydrocephalus. He stated that a needle could be inserted through the mother's abdomen to safely reduce the size of the child's head in order to allow the physician to perform an abortion through induction.

The Court finds Giles' testimony more credible. Giles spoke from substantial experience in high risk pregnancies, having performed over 1,000 abortions through induction without any major complications. His view that induction could be used in the situations Broekhuizen described is supported by Broekhuizen's experience. Although Broekhuizen intended to perform the D&X procedure in the first two circumstances he described, he did not actually perform the procedure. In each case the pregnancy was aborted through what was essentially an induction procedure.

Moreover, Giles expressed his opinion that the D&X procedure is never necessary to save the live or preserve the health of a woman despite the fact that Giles regularly provides abortions and otherwise supports a woman's right to an elective abortion. Giles' willingness to state what must be an unpopular view in the circles in which he travels bolsters his credibility.

Haskell and Broekhuizen criticized Giles' use of cervical relaxants and other drugs, but there was no showing that these doctors had the expertise or experience to offer this criticism. Moreover, Giles' substantial success in performing abortions through inductions is more credible evidence than the unsupported opinions of these physicians.

In light of this substantial evidence, the Court concludes that partial birth abortion is never medically necessary to preserve the health or life of a woman and abolition of the procedure does not subject women to materially greater health risks. D&E is nearly always an option and there has been no credible showing that D&E is riskier that D&X. Moreover, induction is safer than even D&E and can be used in those rare pregnancies, if any, where D&E would be problematic.

Moreover, having reviewed the proposed amendments to the Act as well as the amicus brief filed by state legislators, the Court finds that the Legislature did not adopt the Act for the purpose of placing an obstacle in the path of women seeking an abortion. As the Court has previously stated, the proposed amendments were reasonably rejected to avoid creating loopholes in the law that would have allowed physicians to easily avoid the restrictions the law imposes. *Planned Parenthood v. Doyle*, 9 F. Supp. 2d at 1042.

**The State Interest Served by the Act** -- In addition to the facts already stated, the following facts are relevant to whether the Act serves a compelling state interest.

As Giles testified, partial birth abortion raises several concerns including pain to the child, denying the child any possibility of survival, and risks to maternal health. These concerns have been noted by the AMA and have been discussed in prominent medical journals. See Exs. 17, 205, 206, 207 and 240. In an article in the Journal of the

American Medical Association, Drs. Sprang and Neerhof concluded that "intact D&X partial-birth abortion should not be performed because it is needlessly risky, inhumane and ethically unacceptable." Ex. 206 at 746. They observed that when the physician kills a child in a partial birth abortion, the child "is merely inches from being delivered and obtaining full legal rights of personhood under the US Constitution." *Id.* at 746. Accordingly, the doctors concluded that partial birth abortion is "closer to infanticide than it is to abortion." *Id.* The legislators who filed an amicus brief make similar arguments.

The Court concludes that these facts demonstrate that the Act serves compelling state interests.

**Conclusions of Law**

The Court now turns to its conclusions of law with a view toward determining whether the Court of Appeals' concerns regarding the constitutionality of the Act remain valid.

In undertaking this task, the Court must begin its review of the Act with the strong presumption that it is constitutional. *State v. Cissell*, 378 N.W.2d 691 (Wis. 1985); *Andree v. Ashland County*, 818 F.2d 1306, 1313 (7th Cir. 1987). Plaintiffs bear the burden of showing that the Act is unconstitutional beyond a reasonable doubt. *Wisconsin v. Carpenter*, 541 N.W.2d 105, 109 (Wis. 1995). In assessing whether a party has carried its burden of proof, "every presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality." *Id.* In light of these considerations and the evidence presented, the Court finds that the Act is constitutional. The fully developed record demonstrates that the Court of Appeals' concerns have not been borne out by the evidence.

First, the evidence establishes that the Act need not make an exception for cases in which the fetus is not yet viable at the time of the abortion. *Planned Parenthood v. Casey, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992),* plainly establishes that states may regulate abortions pre-viability. They may do so in order to "further the interest in potential life or some other valid state interest" so long as their regulation does not place a substantial obstacle in the path of a woman seeking an abortion. *Casey 505 U.S. at 877* (emphasis added). Accordingly, the Act is not unconstitutional *per se* merely because it does not make an exception pre-viability. Rather, the Court of Appeals found the Act unconstitutional based on its finding that the Act did not serve the state's interest in maternal health or potential life or any other compelling state interest. *See Planned Parenthood v. Doyle*, 162 F.3d at 466-67.

As noted, the fully developed record establishes that the Act serves several compelling state interests, including interests in maternal health, potential life and morality.

**Maternal Health** -- The Act serves Wisconsin's interest in maternal health insofar as use of the D&X procedure places women at higher risk of infection, rupture of the amniotic sac, and cervical incompetence. Wisconsin could rationally prohibit use of what is clearly an unnecessary procedure in order to protect women from these dangers.

**Potential Life** -- The Act also serves Wisconsin's interest in potential life insofar as use of the D&X procedure creates risks for subsequent pregnancies due to cervical incompetence.

**Morality** -- It has long been recognized that states have a legitimate interest in prohibiting conduct deemed immoral. *See Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)

(upholding constitutionality of Georgia's sodomy law in part because it was rationally related to "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable"). Although abortion laws are typically justified according to the state's interest in maternal health or potential life, the *Casey* court specifically recognized that "other valid state interest[s]" could justify a pre-viability abortion restriction. *Casey*, 505 U.S. at 877.

As the Court of Appeals observed, the Act is not likely to save the life of any child because other safe alternative methods of abortion are available. *Planned Parenthood v. Doyle*, 162 F.3d at 470. Nevertheless, even if the state's interest in a child previability is not sufficient to allow the state to protect it from destruction, in the D&X procedure the child is just inches from being born. Surely at that point the state has a sufficient interest in the child to allow the state to regulate the manner of the child's death, regardless of whether the State is able to keep the child alive. Wisconsin has declared that such children are not to endure -- and Wisconsin physicians are not to inflict -- the gruesome death imposed in the D&X procedure. It is well-within the province of the state to legislate against the immorality of partial birth abortion.

Perhaps, as plaintiffs argue, the child will endure a gruesome death through some other method of abortion. This does not detract from the legitimacy of Wisconsin's partial birth abortion law, however, because it is apparently beyond Wisconsin's power to eliminate those other methods of abortion. Wisconsin *can* eliminate this one method. Given the national groundswell of opposition to partial birth abortion and the ethical concerns raised within the medical community concerning the procedure, the State cannot be faulted for acting where it can to outlaw an unnecessary procedure that in most cases in which it is used is literally inches away from being infanticide.

Any and all of these state interests justify Wisconsin's partial birth abortion law so that the Act need not make an exception for cases in which the fetus is not yet viable at the time of the abortion.

Second, the Act need not contain an exception for cases in which a D&X procedure is necessary for the preservation of the mother's health. As noted, a pre-viability restriction on the right to an abortion is unconstitutional if it places an undue burden on a woman's right to choose an abortion. *Casey*, 505 U.S. at 877. As the Court of Appeals found, a law which prohibits women from obtaining an abortion through a method that is necessary for the preservation of the mother's health places an undue burden on the woman's right to an abortion. *Planned Parenthood v. Doyle*, 162 F.3d at 468.

But as the fully developed record reveals, Wisconsin's partial birth abortion law is not such a law. Partial birth abortion is *never* medically necessary to preserve the health or save the life of a woman and abolition of the procedure does not subject women to materially greater health risks. Accordingly, the trial has "cast the facts in a different light." While the Court of Appeals assumed that the D&X procedure would be the best medical procedure for obtaining an abortion in at least some circumstances, the evidence demonstrates that it is not. Because the Act leaves women with safe, alternative methods of abortion, it does not impose an undue burden on their abortion rights.

Third, the Act is not vague. The Court remains convinced that plaintiffs' alleged confusion concerning the meaning of the Act is a demon of their own creation. Everyone understands what partial birth abortion is and what it is not. It *is* the D&X procedure. It *is not* the suction curettage procedure, the induction procedure or the D&E procedure.

Defendants have stipulated to this reading of the law, which supports the Court's interpretation. *See Wolman v. Walter*, 433 U.S. 229, 238 (1976) (Blackmun, J.) (relying in part on the defendants' stipulation as to the meaning of a law in rejecting the plaintiffs' assertion that the statute at issue was "so vague as to fail to insure against sectarian abuse.")

In rejecting plaintiffs' motion for a preliminary injunction, this Court found that *only* in the D&X method of abortion does a physician act with the purpose of performing a procedure in the steps described by the statute -- *first* partially vaginally delivering a living child and *then* causing the death of the partially delivered child with the intent to kill the child and *then* completing delivery of the child. *Planned Parenthood v. Doyle*, 9 F. Supp. 2d at 1041-44. The Court of Appeals did not take issue with this conclusion. Nevertheless, it observed that the Act "must be read in light of the definition of 'intentionally' elsewhere in Wisconsin criminal-law statutes as either acting purposely to accomplish the forbidden end or being 'aware that [one's] conduct is practically certain to cause that result.'" *Planned Parenthood v. Doyle*, 162 F.3d at 469, citing Wis. Stat. § 939.23(3). The Court of Appeals observed that in some methods of abortion other than D&X a physician might be aware that he or she is "practically certain" to kill an intact living child in the birth canal before delivery is completed. Plaintiffs took the same position at trial. *See* Plaintiffs' Proposed Finding of Fact No. 24.

The fully developed record has not justified this concern. As noted, physicians cannot control when death occurs in induction and suction curettage abortions and cannot be "practically certain" that any step they take will kill a fetus in the birth canal. Accordingly, even if their conduct in performing these abortions is construed as partially delivering a living child, they do not thereafter take any second step for the purpose of killing the child or that is

practically certain to kill the child before completing delivery. Moreover, a physician who sets out to perform an abortion through suction curettage or induction does not purposely perform the three steps proscribed by the act in the order proscribed, nor is he or she practically certain to do so.

The D&E procedure also is not covered by the Act. The physician in the D&E procedure removes the fetus in parts. As this Court has already held, the Act refers to delivery of a "child" which cannot be equated to delivery of "dismembered body parts." *Planned Parenthood v. Doyle*, 9 F. Supp. 2d at 1041. Accordingly, the *legal* interpretation of the Act excludes delivery of a dismembered fetus, regardless of the *lay* interpretation which the testifying physicians -- including Giles, defendants' expert -- sought to impose upon the Act. The Act does not apply to the D&E procedure.

For similar reasons, the Act *does* apply to the D&X procedure. The D&X procedure is distinct from the D&E procedure in that the goal of the D&X is to extract an *intact fetus* -- a "child" -- rather than a dismembered fetus. Haskell, Christensen and Smith agreed with this distinction. Moreover, the D&X procedure is the only procedure in which the physician purposely follows the sequence of steps proscribed by the Act. Accordingly, D&X is the only abortion procedure abolished by the Act.

Plaintiffs also complain that there is disagreement concerning what a D&X is, thereby making the law vague. But the evidence demonstrated substantial agreement concerning the meaning of D&X. All of the medical authorities offer substantially the same definition of D&X. To the extent they disagree in any relevant way, it is a disagreement concerning how physicians kill the child -- whether through suctioning the cranial contents, crushing the skull or cutting the umbilical cord. But there is no disagreement that if a physician takes one of these steps after

partially vaginally delivering a living child and then completes delivery of the child, he or she has performed a partial birth abortion. Accordingly, the law gives physicians reasonable notice of the conduct proscribed.

As noted, the Act is constitutional if it prohibits only the D&X procedure. In reviewing the language of the Act, it is difficult to discern how the Legislature could have signaled any more clearly its intent to adopt this limited prohibition -- without creating enormous loopholes in the law. The Act specifically uses the term "partial birth abortion" which physicians understand to mean D&X abortions. Moreover, the steps it describes as constituting a "partial birth abortion" apply most naturally and easily to the D&X procedure. Dr. Broekhuizen conceded that it is only by bending the language of the Act beyond its most obvious meaning that it can be construed to apply to the suction curettage method of abortion. The same is true with regard to all other methods of abortion except D&X. The contortions the plaintiffs invite this Court to impose on the law run contrary to the command that every presumption in favor of constitutionality be indulged. Accordingly, the Court concludes that the law is not vague.

**Consent**

One issue remains that was not addressed by the Court of Appeals. Plaintiffs argue that the civil liability provisions in the Act amount to an unconstitutional tacit consent requirement. However, as this Court held in response to plaintiffs' motion for a preliminary injunction, if the law criminalizing partial-birth abortions is constitutionally sound, then a law imposing civil sanctions for the same activity must withstand a constitutional challenge as well. *See United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991). Having found the criminal sanctions in the Act constitutional, the Court finds the civil sanctions constitutional as well.

ORDER

IT IS ORDERED that judgment be entered in favor of defendants against plaintiffs dismissing their complaint and all claims contained therein with prejudice and costs except as to Section 895.038(3)(b) of the Act which is severed and declared unconstitutional.

IT IS FURTHER ORDERED that enforcement of the judgment is stayed pending appeal.

Entered this 4th day of June, 1999.

BY THE COURT:

JOHN C. SHABAZ
District Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-2521

Planned Parenthood of Wisconsin, *et al.*,

Plaintiffs-Appellants,

v.

James E. Doyle, in his official capacity as Attorney General of the State of Wisconsin, and Diana M. Nicks, in her official capacity as District Attorney for Dane County and as a representative of a class consisting of all district attorneys in the State of Wisconsin,

Defendants-Appellees,

and Thomas J. Back and Fredric K. Buford, II,

Intervening Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 98 C 305--John C. Shabaz, *Chief Judge*.

Argued August 10, 1998--Decided November 3, 1998

Before POSNER, *Chief Judge*, and MANION and ROVNER, *Circuit Judges*.

POSNER, *Chief Judge*. This is an appeal from the denial (reported at 9 F. Supp. 2d 1033 (W.D. Wis. 1998)) of a motion for a preliminary injunction against the enforcement of a recently enacted Wisconsin statute that decrees life

imprisonment for anyone who performs a "partial birth abortion." Wis. Stat. §§ 939.50(3)(a), 940.16(2). We stayed both the enforcement of the statute and further proceedings in the district court pending the decision of this appeal.

The statute defines a partial birth abortion as "an abortion in which a person partially vaginally delivers a living child, causes the death of the partially delivered child with the intent to kill the child, and then completes the delivery of the child." § 940.16(1)(b). The statute defines "child" to mean "a human being from the time of fertilization," § 940.16(1)(a), and the parties assume that "living" means having a heartbeat. Hence a partial birth abortion is criminal even if the fetus is not yet viable (that is, couldn't survive outside of the womb), provided that it has a heartbeat. The only exception to the statutory prohibition is where the partial birth abortion is "necessary to save the life of the [mother]." § 940.16(3).

The Wisconsin branch of Planned Parenthood, plus several physicians who perform abortions in Wisconsin, brought suit against the state's attorney general and other state law enforcement officials to enjoin the enforcement of the new statute, contending that it violates the Fourteenth Amendment. One of the plaintiff physicians regularly though infrequently performs the type of abortion variously termed "intact dilation and evacuation," "dilation and extraction," and (the term we'll use) "D&X." The others would like the option to consider performing it should the condition of a patient so warrant. The standing of the physician plaintiffs, and of Planned Parenthood as the owner of abortion clinics in Wisconsin, to maintain this suit is not open to question. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 62 (1976); *Doe v. Bolton*, 410 U.S. 179, 188-89 (1973). Not so the standing of the intervening defendants, two husbands of pregnant women, to be parties to the suit. As these men are passionately opposed to

abortion of any kind and do not suggest that their wives disagree with them about the issue and so might consider undergoing a D&X, they have no significant interest in this litigation other than an ideological one. A purely ideological interest is not an adequate basis for standing to sue in a federal court, *Diamond v. Charles*, 476 U.S. 54, 67 (1986); *United States v. SCRAP*, 412 U.S. 669, 687 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 739-40 (1972)--and we require such standing of all would-be intervenors. *Solid Waste Agency v. U.S. Army Corps of Engineers*, 101 F.3d 503, 507 (7th Cir. 1996). If these men have standing to oppose a challenge to the partial abortion law, then any potential beneficiary of a statute could intervene in any suit challenging the statute's scope or validity, something no one believes. We add that there is nothing to suggest that the state is not an adequate representative of the intervenors' interests.

We turn from standing to the merits. The decision whether to grant a preliminary injunction requires consideration both of the likelihood that the plaintiff will win when the case is tried in full and of the relative harms to the parties of granting or denying the injunction. The stronger the likelihood that the plaintiff will win, the less of a showing he need make that the denial of the preliminary injunction would hurt him more than granting it would hurt the defendant. *Hetreed v. Allstate Ins. Co.*, 135 F.3d 1155, 1158 (7th Cir. 1998); *American Hospital Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589, 593 (7th Cir. 1985); *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 743 (1st Cir. 1996); cf. *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). If the defendant is very likely to lose, allowing him to continue in his probably unlawful course of conduct until the end of what may be protracted proceedings would give him a windfall.

The balancing of the imponderables involved in the decision whether to grant or deny a preliminary injunction is a task calling for a judgment based on the particulars of the individual case. The district judge's decision is therefore entitled to considerable weight--the weight encapsulated in the concept of appellate review for "abuse of discretion." *Fleet Wholesale Supply Co. v. Remington Arms Co.*, 846 F.2d 1095, 1097 (7th Cir. 1988); *American Hospital Supply Corp. v. Hospital Products Ltd., supra*, 780 F.2d at 595; *Smith, Bucklin & Associates, Inc. v. Sonntag*, 317 U.S. App. D.C. 364, 83 F.3d 476, 479 (D.C. Cir. 1996). But when it is clear that the plaintiff is both highly likely to prevail when the case is tried in full and is more likely to be harmed by the denial of preliminary relief than the defendant is to be harmed by its grant, we reverse. *Meridian Mutual Ins. Co. v. Meridian Ins. Group, Inc.*, 128 F.3d 1111, 1120-21 (7th Cir. 1997); *Kirkeby v. Furness*, 52 F.3d 772, 774 (8th Cir. 1995); see also *Thomas & Betts Corp. v. Panduit Corp.*, 65 F.3d 654, 657-64 (7th Cir. 1995); *August Storck K.G. v. Nabisco, Inc.*, 59 F.3d 616, 619-20 (7th Cir. 1995). It should go without saying that in deciding these questions in this appeal we must, so far as it is humanly possible to do, lay to one side whatever personal reservations any of us may have either about abortion in general or about the decisions in which the Supreme Court has interpreted the Constitution as creating a right to abortion.

The origin of the statute challenged in this case is a paper by a physician describing the D&X method of abortion. Martin Haskell, "Dilation and Extraction for Late Second Trimester Abortion" (1992), reprinted in 139 *Cong. Rec. E1092, 1993 WL 135664* (Apr. 28, 1993), and in *The Partial-Birth Abortion Ban Act of 1995*, Hearing before the S. Comm. on the Judiciary, 104th Cong., 1st Sess. 5 (Nov. 17, 1995). The procedure is employed rarely (though how rarely we don't know-there are no reliable statistics on this question), and usually only in late-term abortions (20 weeks

or more). After the cervix (the mouth of the uterus), has been dilated, a process that can take several days, the D&X procedure is ready to begin. The physician draws the fetus out feet first. When only the fetus's head remains in the uterus, the physician inserts a scissors into the base of the fetus's brain, inserts a tube in the hole made by the scissors, and removes the contents of the skull by suction, causing the skull to collapse. The physician then completes the extraction of the now-dead fetus from the woman's body, death having occurred while the body of the fetus was in the vagina.

The unpleasantness of the procedure (and perhaps the fact that the only reason Haskell's paper gave for it is that it can be performed on an outpatient basis with a local anesthetic--though this implies that it may be safer for the woman than alternative methods of abortion) has given rise to a host of state statutes, as well as to bills in Congress (two of which President Clinton has vetoed), designed to outlaw it. There are differences among these statutes (see, e.g., *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), invalidating the Ohio statute), but we ignore them and confine our attention to the Wisconsin law. On the basis of the record compiled to date in this litigation--a potentially important qualification, since the full trial may cast the facts in a different light--it is apparent that whatever may be the case with the other statutes, Wisconsin's statute impermissibly burdens the constitutionally recognized right to an abortion in three respects.

First, it contains no exception for cases in which the fetus is not yet viable (that is, cannot survive outside the mother's body); all that is required, as we noted, is that the fetus have a heartbeat, and that is well before viability. The fetal heartbeat is detectable at 6 weeks, Robert Berkow et al., *The Merck Manual* 1851 (16th ed. 1993), while in the present state of medical technology the fetus may become viable as

early as 20 weeks into the pregnancy or as late as 27 weeks (or later--and some terribly malformed fetuses never attain viability). Therefore some D&X abortions (a procedure employed from week 20 on) are likely to be of fetuses that are not yet viable but have a heartbeat and so are protected by the statute. The statutory prohibition of aborting such fetuses--a prohibition that, remember, allows as the sole exception cases in which the mother's life is at stake--is unconstitutional.

*Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973), allowed states to regulate abortion after the first trimester even though most second-trimester and some thirdtrimester fetuses are not viable. But in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court jettisoned the trimester framework of analysis and in the course of doing so ruled that government may not rely on its interest in the potential life of the fetus to interpose a significant obstacle to abortion before viability. *Id.* at 846. It may adopt measures that, while not preventing the pregnant woman from deciding whether to have an abortion, remind her of the gravity of the choice and the value of fetal life. *Id.* at 877-78, 899-900 (plurality opinion, but expressing a view supported by a majority of the Justices). And it may adopt paternalistic measures for the protection of the mother's health, as by requiring that only physicians be allowed to perform abortions. *Mazurek v. Armstrong*, 117 S. Ct. 1865 (1997) (per curiam). Although such a requirement might in principle pose a substantial obstacle to abortion, the record in *Mazurek* showed that it did not in fact. *Id.* at 1866-67. But Wisconsin's law cannot be defended by reference to either rationale. It does not seek to make the woman more informed. It emphatically does not protect her health--it endangers her health, as we are about to see. It does not protect fetal life, for it merely bans one method of abortion,

leaving all others unregulated regardless of the stage the pregnancy has reached.

Second, the statute contains no exception for the case in which a D&X, either before or after viability, is necessary for the preservation of the mother's health. Even if the mother would become sterile if an alternative procedure were used (or if she carried the fetus to term)--even if she would become paralyzed, or, as the state's lawyer affirmed at argument, put at a risk though not a certainty of death--the physician who performed the abortion would still be guilty of a crime that is punished as severely as Wisconsin, which does not have capital punishment, punishes murder. The Supreme Court has made clear that even a law limited to viable fetuses, as Wisconsin's is not, must make an exception "for pregnancies which endanger the woman's life or health." *Planned Parenthood of Southeastern Pennsylvania v. Casey, supra*, 505 U.S. at 846; *Women's Medical Professional Corp. v. Voinovich, supra*, 130 F.3d at 209; *Jane L. v. Bangerter*, 61 F.3d 1493, 1504 (10th Cir. 1995), rev'd on other grounds under the name *Leavitt v. Jane L.*, 518 U.S. 137 (1996) (per curiam). Wisconsin's law contains no such exception, no matter how grave the threat to the woman's health short of a certainty of death.

The state tells us that there is no need for such an exception because there is no pregnancy in which an equally safe alternative procedure is not available. There is indeed always an alternative form of abortion to a D&X. But the alternative may not always be the best from the standpoint of the mother's health. The most common methods of late-term abortion (the only stage at which a D&X would be considered) are, first, medical induction, and, second, dilation and evacuation (D&E). In the most common form of induction, the physician injects into the uterus a substance designed both to kill the fetus and to induce labor, which will cause the fetus to be expelled. Less commonly, the physician

will use a drug that merely induces labor, in which event the contractions will usually kill the fetus but in a few cases will (unintentionally, of course) produce a live birth. The most common alternative to induction is dilation and evacuation (D&E), the standard second-trimester method of abortion but sometimes employed later, often in conjunction with induction. D&E involves killing the fetus in the womb either by injecting a lethal drug into the fetus or by crushing its skull and removing the dead fetus (often piecemeal) with instruments. See generally Warren M. Hern, *Abortion Practice* 122-60 (1984); Mokhtar Toppozada, "Terminations of Pregnancy After 14 Weeks," in *Modern Methods of Inducing Abortion* 70 (David T. Baird, David A. Grimes & Paul F.A. Van Look eds. 1995).

Both induction and D&E pose risks to the mother. Induction, involving as it does labor, creates some of the same risks as childbirth itself (though presumably fewer because the labor involved in induction occurs earlier in the pregnancy), as well as a risk of injury from the drugs that are used. And when a nonlethal drug is used to induce the labor, the fetus may be born alive. D&E creates a risk of perforating the uterus and of leaving pieces of the fetus in the uterus, which may cause serious infection. The larger the fetus, the greater these risks. The D&X procedure is a variant of D&E designed to avoid both labor and the occasional failures of induction as a method of aborting the fetus, while also avoiding the potential complications of a D&E.

For some women, it may be the safest procedure. So at least the plaintiff physicians believe, and these beliefs are detailed in affidavits submitted in the district court. This is also the opinion of the most reputable medical authorities in the United States to have addressed the issue: the American Medical Association and the American College of Obstetricians and Gynecologists. See AMA, *Report 26 of the*

*Board of Trustees* (1997); ACOG, *Statement on Intact Dilation and Extraction* (1997). It is true that the AMA has endorsed one of the federal partial-birth abortion bills (see its May 20, 1997, press release entitled "AMA Supports H.R. 1122 as Amended"), H.R. 1122, 105th Cong., 1st Sess. (1997) (as amended by the Senate that day). But the bill contains a number of safeguards absent from Wisconsin's law and in endorsing the bill the AMA did not retract the views expressed in *Report 26*.

The opinion of the medical authorities that for some women in some circumstances a D&X may be the safest procedure is just that, an opinion, or if you will a speculation, because the procedure has not been studied systematically, maybe because of its infrequency, novelty, and controversiality. But responsible medical opinion is often in advance of clinical trials, which may take many years to complete. Against the informed though not infallible opinion of the medical establishment the defendants offer only the virtually word-for-word-identical affidavits of five physicians. Insofar as they address the question of safety or health at all, these physicians make only two points, and make them without elaboration or supporting reasons. The first is that there are as yet no peer-reviewed, scientific studies of the relative safety of the D&X procedure, which is true but of little significance in itself, for the reason just noted. The second point, which mixes statutory interpretation with medical opinion, is that "in every situation where the life of the mother is not at risk--an exception permitted by the [Wisconsin] Act--the proposed procedure may be safely varied to avoid the prohibitions of the Act . . . and/or commonly used, safe alternative abortion procedures may be used." The premise of this crucial assertion is false. The statute contains no exception for cases in which the life of the mother is merely "at risk." These physicians nowhere state that in every pregnancy there is an alternative procedure that will protect the health of the mother as effectively as a

D&X would do. Their affidavits are thus no evidence at all concerning the health implications of banning the procedure, and leave the balance of evidence on the issue of health decisively inclined in favor of the plaintiffs.

Wisconsin law, following the *Casey* decision, forbids performing an abortion after the fetus has become viable unless the life or health of the mother is in jeopardy. Wis. Stat. § 940.15(3); see 509 U.S. at 879. This means that the universe of lawful late-term abortions in Wisconsin is largely (not entirely, because some late-term abortions are of nonviable fetuses) confined to ones in which there is a health risk. These are precisely the cases in which it is most important for the woman's health that the physician have the maximum latitude to choose the procedure that is best in the particular circumstances.

Wisconsin is taking chances of unknown magnitude with the health of pregnant women. This the Supreme Court's decisions do not permit. Those decisions require that maternal health be the physician's paramount concern. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 768-69 (1986); *Colautti v. Franklin*, 439 U.S. 379, 400 (1979); *Planned Parenthood of Central Missouri v. Danforth, supra*, 428 U.S. at 78-79. It is true that *Casey* permits the state to trade off a *de minimis* risk to the mother's health against an interest in fetal life. *Planned Parenthood of Southeastern Pennsylvania v. Casey, supra*, 505 U.S. at 885-96. But here there is no interest in fetal life. *Casey* upheld a 24-hour waiting-period requirement, the intention of which was to encourage the woman to rethink her decision to have an abortion. This case involves merely the method of abortion.

Nor is it clear that the risk is slight for all women; and in this respect the fact that the procedure is rare is irrelevant. A woman whose health depends on it will not be comforted to

learn that Wisconsin has decided to ban the procedure because only a few women need it and so the state can make a low-cost statement of opposition to abortion rights.

Third, the statute is vague. Fearful of creating loopholes, Wisconsin decided not to forbid the specific procedure described by Dr. Haskell but to adopt a more sweeping prohibition. Loopholes are an entirely legitimate concern of legislatures, and despite much judge and lawyer talk about the imperative of clarity in criminal legislation, criminal laws are rarely struck down on grounds of vagueness; vagueness is recognized to be necessary to make criminal laws fully effective. 1 Wayne R. LaFave & Austin W. Scott, *Substantive Criminal Law* § 2.3(a), p. 128 (1986). It becomes a graver concern when it operates to deter the exercise of constitutional rights. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Colautti v. Franklin, supra*, 439 U.S. at 391; John C. Jeffries, "Legality, Vagueness, and the Construction of Penal Statutes," 71 *Va. L. Rev.* 189, 196 (1985); Note, "The Void-for-Vagueness Doctrine in the Supreme Court," 109 *U. Pa. L. Rev.* 67, 75 (1960). When vague statutes prescribe heavy penalties for violation, rational people avoid any conduct that *might* be thought to fall within the statute's scope, even if in an error-free litigation the conduct would be sure to be found constitutionally protected. Hence a statute that punishes a class of constitutionally punishable abortions so vaguely that it makes doctors afraid to perform constitutionally permissible abortions is quite likely to infringe constitutional rights. *Colautti v. Franklin, supra*, 439 U.S. at 390-401; *Charles v. Daley*, 749 F.2d 452, 460 (7th Cir. 1984); *Women's Medical Professional Corp. v. Voinovich, supra*, 130 F.3d at 203. Wisconsin's partial birth abortion statute is such a statute, especially given the severity of the punishment for violation. The threat of life imprisonment is bound to induce doctors to give the core of the statutory prohibition a wide berth. As a result, pregnant women in Wisconsin may

find it impossible to obtain any type of abortion that might conceivably though mistakenly be held in a prosecution of the physician to be a partial birth abortion.

The statute does not define any of its terms except "child." But it must be read in light of the definition of "intentionally" elsewhere in Wisconsin criminal-law statutes as either acting purposely to accomplish the forbidden end or being "aware that [one's] conduct is practically certain to cause that result." Wis. Stat. § 939.23(3). As glossed by the case law in Wisconsin and elsewhere, this definition is satisfied by conduct carrying a known high risk of the forbidden result even if that result is not desired. See *State v. Gould*, 56 Wis. 2d 808, 202 N.W.2d 903, 906 (Wis. 1973); *State v. McCarter*, 36 Wis. 2d 608, 153 N.W.2d 527, 529 (Wis. 1967); *United States v. United States Gypsum Co.*, 438 U.S. 422, 444-46 (1978); *Smith v. Farley*, 59 F.3d 659, 663 (7th Cir. 1995); *United States v. McAnally*, 666 F.2d 1116, 1119 (7th Cir. 1981); 1 LaFave & Scott, *supra*, § 3.5(a)-(c), pp. 304-11. The district court gave an example, finding on the basis of uncontradicted evidence that in some instances of medical induction the fetus still has a heartbeat when it enters the birth canal. If so, often death will occur there. Perhaps, therefore, a Wisconsin court would allow a jury to find that a physician who performed medical induction on a regular basis (as one of the plaintiffs does) was "practically certain" that he was causing a certain number of fetuses to die in the birth canal. Or perhaps not. But even if the probability of prosecution and conviction of such physicians is small, it doesn't take a high probability of such consequences to have a deterrent effect when the penalty upon conviction is life in prison.

The state's argument that induced labor is not a form of physician-assisted delivery has no support in the statute and is contrary to common usage. Often labor is induced by a physician when a pregnant woman reaches the end of her

term and fails to go into labor spontaneously, or earlier if the health of the mother or fetus would be endangered by waiting.

The statute's infirmities are magnified by the difficulty that the state's lawyers have had in explaining what interest the statute is designed to protect. Even if the standard for judicial review of state abortion laws challenged under the due process clause of the Fourteenth Amendment were merely that of rational relation to a legitimate state interest, Wisconsin's partial birth statute would be in trouble. Not because states do not have legitimate interests in the regulation of abortion, especially late-term abortions, but because the Wisconsin statute does not seem rationally related to any of those interests, and in particular to the interest in the preservation of fetal life. If the state is right that there is always an equally safe alternative form of abortion to a partial birth abortion, then the statute cannot discourage abortions--cannot save any fetuses--but can merely shift their locus from the birth canal to the uterus. What interest has the state in such a shift? This is not a statute, like the one upheld in *Casey*, rationally designed to protect fetal life by making women think carefully about alternatives to abortion (such as completing the pregnancy and putting up the baby for adoption). It is not a statute designed to protect a woman's health; on the contrary. And it can save fetuses only by endangering pregnant women, since the only time a woman denied a partial birth abortion will decide to carry the fetus to term is when the alternative methods of abortion would pose a greater risk to her. No argument is made, and we are not aware of any basis for such an argument, that if a fetus feels pain, the pain is worse when the fetus is killed in the birth canal than when death occurs a moment earlier in the womb. And therefore Wisconsin's statute cannot be analogized to statutes that prohibit cruelty to animals.

Partial birth abortion is a gruesome procedure. But *all* abortion procedures, and indeed a vast number of surgical procedures unrelated to the reproductive process, including forms of cosmetic surgery that strike many people as frivolous, are bloody and horrible. It is difficult to see how anyone acquainted with abortion techniques (lucidly described in Alan F. Guttmacher & Irwin H. Kaiser, "The Genesis of Liberalized Abortion in New York: A Personal Insight," in *Abortion, Medicine, and the Law* 546, 557-564 (4th ed., J. Douglas Butler & David F. Walbert eds., 1992)) could suppose partial birth abortion more gruesome than the alternatives that Wisconsin has not attempted to prohibit. In a first-trimester abortion the physician uses either surgical instruments or a suction pump to remove the fetus from the uterus. D&E, standard in a second-trimester abortion, routinely involves the crushing of the fetus's cranium; and even in first-trimester abortion the fetus is sometimes removed piecemeal; "if a fetus beyond 10 weeks of age is recognized, the fragments should be reassembled to see if the fetus is essentially complete" because any fetal tissue remaining in the uterus could cause infection. Michael S. Burnhill, "Reducing the Risks of Pregnancy Termination," in *Prevention and Treatment of Contraceptive Failure: In Honor of Christopher Tietze* 141, 145 (Uta Landy & S.S. Ratnam eds. 1986); see also Guttmacher & Kaiser, supra, at 558-560; David A. Grimes & Kenneth F. Schulz, "Morbidity and Mortality from Second-Trimester Abortions," 30 *J. Reproductive Medicine* 505, 508 (1985). In the rare third-trimester abortion, the doctor may kill the fetus by injecting a chemical into the fetus's heart or by drilling a hole in the fetus's cranium and removing the fetus's spinal fluid through the hole.

We do not question a state's right to express moral indignation through its criminal law, *Milner v. Apfel*, 148 F.3d 812, 814 (7th Cir. 1998), but of course that right is limited by the constitutional rights of the persons whose

conduct the state seeks to punish. And we have difficulty understanding--and the state's briefs and argument have made no effort to explain--how a rational legislature could sense a moral difference between the method of concededly lawful abortion described at the end of the preceding paragraph and the partial birth method that the statute forbids under penalty of life imprisonment.

Nor do we question the state's right to regulate the practice of medicine. But when that right comes into collision with a constitutional right, the state has to give a reason for regulating medicine in a way that impairs the interest that the constitutional right seeks to protect. Obviously a state would not be permitted to justify a law forbidding black doctors to treat white patients on the ground that it was a regulation of medicine.

We also do not doubt that if in the course of a normal labor the mother asked her obstetrician to kill the baby in the birth canal and he did so, the state could criminalize this act as infanticide. Cf. Wis. Stat. § 940.05. But here, to repeat, the state has criminalized merely a procedure, and acknowledged the right to abort by an alternative procedure the same fetus whose death by partial birth abortion would subject the doctor to punishment as a murderer. So there is no issue of infanticide, of killing a live baby that is half-born.

The constitutional right to an abortion carries with it the right to perform medical procedures that many people find distasteful or worse. The singling out of the D&X procedure for anathematization seems arbitrary to the point of irrationality. Annexing the penalty of life imprisonment to a medical procedure that may be the safest alternative for women who have chosen abortion because of the risk that childbirth would pose to their health adds a note of the macabre to the Wisconsin statute, especially when we consider that physicians can insulate themselves from all

legal risk by killing the fetus *in utero*. The only fetuses whom the statute will save are those whose mothers are afraid for reasons of health to undergo an alternative procedure to a partial birth abortion.

This question of just what interest of the state the partial birth abortion statute protects bears on the balance of harms involved in the decision whether to grant or deny preliminary relief against the statute. If that relief is denied and the statute is permitted to go back into force, a few fetuses will die in a manner different from what the physician would prefer and some women will be endangered; no fetuses will be saved unless physicians are deterred by threat of life imprisonment from performing any type of late-term abortion. The balance favors the grant of preliminary relief; the case for that relief becomes conclusive when the constitutional defects of the statute are considered.

The decision of the district court is reversed with directions to grant a preliminary injunction against the enforcement of the Wisconsin partial birth abortion statute and to dismiss the defendant intervenors as parties.

REVERSED.

MANION, *Circuit Judge*, dissenting.

## I.

"Partial birth abortion" is neither a legal nor a medical term. That is why some legal and medical experts have difficulty determining the parameters of the Wisconsin statute that attempts to ban the procedure. Nevertheless, members of the Wisconsin legislature as well as many state legislatures around the country and a significant majority of

the U.S. Congress seem to have a grip on what they want to outlaw. Medically the procedure is called intact dilation and extraction, or D&X. As this court succinctly explained, *ante* at 5, the living fetus is maneuvered so that it can be pulled from the uterus feet first until the head (the largest part of the body) becomes lodged in the cervix. The physician then uses scissors to create a hole in the base of the skull through which he inserts a suction tube that removes the "contents," causing the skull to collapse. "The physician then completes the extraction of the now-dead fetus from the woman's body, death having occurred while the body of the fetus was in the vagina." *Id.* It is easy to understand why significant majorities of citizens want this procedure banned.

Although a very rare procedure, the D&X has been graphically described and publicized by opponents of abortion. Likely this has helped inspire the many legislative enactments. But the many court challenges have further attracted public attention. Here, Planned Parenthood and the other plaintiffs aren't merely defending the right of doctors to perform or for a woman to have a D&X abortion. In fact, they insist this procedure almost never happens. Rather, they claim that the Wisconsin statute is overbroad and vague--that doctors could face life in prison for performing, usually in the second trimester, routine dilation and extraction abortions (D&E) where the fetus is dead before it is removed, usually in several pieces, from the mother's body. This argument has certainly shifted the focus of the debate. Heretofore, the argument over abortion was mostly confined to rights--those favoring abortion rights defend a "right to choose"; those opposing abortion rights proclaim a "right to life." But partial birth abortion has advanced the debate to the specifics of abortion procedures--the methods used, the impact on the unborn child at various stages of gestation, and the health risks to the mother. In the process of aggressively challenging the laws banning partial birth abortion, the abortion rights proponents have (with commendable candor)

graphically described in detail how routine abortions are performed, depending on the age of the unborn. In this case they have engaged in this exposure to underscore their contention that the Wisconsin law banning partial birth abortions is so overbroad that it covers most post-viability abortions (after 22 weeks) and many pre-viability abortions. In other words, rather than denying that they engage in a procedure that many legislatures and the federal Congress have called unacceptable, they claim that they routinely perform the procedures that the statute arguably describes; thus the law would limit a woman's right to have an abortion. (For example, Dr. Christensen explains in his affidavit that in the process of "disarticulation" during a mid-term abortion, a separated fetal "part" might protrude outside the birth canal, leaving behind living cells and a beating heart.)

In my opinion the district court's decision at this preliminary injunction stage is correct. The district court accurately labeled the "plaintiffs' alleged confusion concerning the meaning of Act 219 [as] a demon of their own creation." To avoid having to defend the almost indefensible D&X procedure, the plaintiffs have stretched the plain meaning and intent of the statute to cover almost every abortion procedure that occurs after a few weeks, when the fetal heartbeat begins. Once this fabrication is in place they proclaim that the expanded law bans routine D&E and even some suction curettage abortions--the kind they perform every day. Obviously the Supreme Court has established a right to these routine abortions, so expanding the statute to cover them makes the plaintiffs' challenge more widely acceptable. In other words, in order to level what they see as an effective attack on the ban, they have to pretend the statute is what it is not. But as the district court has concluded, 9 F. Supp. 2d 1033, 1041 (W.D. Wis. 1998), the statute unmistakably regulates only the rare D&X procedure that is used exclusively post-viability, when "potential life" is a reality. *Planned Parenthood of Southeastern Pennsylvania v.*

*Casey*, 505 U.S. 833, 870, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992). The district court properly discarded the plaintiffs' broad interpretation of the Act when they equated "'a living child' with 'dismembered portions of a living child.' This Court, the Wisconsin Legislature and common sense reject such an interpretation." 9 F. Supp. 2d at 1041 (Footnote omitted). The district court has thoroughly examined the evidence before it at this preliminary stage, and has correctly concluded that when the statute is narrowly construed in accordance with Wisconsin law, the standards for denying a preliminary injunction are met.

## II.

*A. Standard of Review*

At this stage the district court has correctly denied the preliminary injunction motion. Planned Parenthood sought a preliminary injunction enjoining 1997 Wisconsin Act 219 from taking effect. "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 117 S. Ct. 1865, 1867 (1997) (quoting 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2948, at 129- 130 (2d ed. 1995)) (emphasis by Supreme Court) (reversing Ninth Circuit's reversal of a district court's denial of a preliminary injunction of a state law allowing only physicians to perform abortions). Under this standard, Planned Parenthood must show that it has more than a negligible chance of success on the merits, and no adequate legal remedy. Once this is established, the district court must then consider the balance of hardships between the plaintiffs and the defendants, adjusting the hardships for the probability of success on the merits. *Boucher v. School Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821, 824 (7th Cir. 1998).

We give deference to the district court when reviewing its decision to deny a preliminary injunction. That means to reverse, the district court's finding of facts must be clearly erroneous, and the district court's balancing of harms in favor of one party must be an abuse of discretion. *Meridian Mut. Ins. Co. v. Meridian Ins. Group, Inc.*, 128 F.3d 1111, 1114 (7th Cir. 1997). On issues of law, we review the district court *de novo, id.*, but just like the state courts, we owe deference to the Wisconsin legislature. Therefore we must first presume this statute to be constitutional, and if possible, interpret it so as to preserve its constitutionality. *See Andree v. Ashland County*, 818 F.2d 1306, 1313 (7th Cir. 1987). The Wisconsin Supreme Court has noted that a "party challenging [a] statute must show it to be unconstitutional beyond a reasonable doubt." *Wisconsin v. Carpenter*, 541 N.W.2d 105, 109 (Wis. 1995). That is a heavy burden for the plaintiffs at the preliminary injunction stage. The court has further noted that "'every presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality.'" *Id.* (quoting *Wisconsin v. McManus*, 447 N.W.2d 654 (1989)). Thus, the plaintiffs must not only overcome the deference owed the district court's factual findings and weighing of hardships, but must also overcome the legal presumption that the Act is constitutional.

*B. Likelihood of Success on the Merits*

The appellants argue that they have a likelihood of overcoming the presumption of constitutionality because the partial birth abortion act places an undue burden on a mother's constitutional right to an abortion,[1] and second,

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[1] Although this case involves a facial attack on a statute, neither side has addressed whether *United States v. Salerno*, 481 U.S. 739, 745 (1987), which establishes that a statute must be unconstitutional under all

because the Act is vague and overbroad it fails to give adequate notice of what it criminalizes.

*1. The undue burden test.*

To reconcile the conflict between a mother's constitutional rights implicated in an abortion decision, and the government's interests in potential life and the regulation of medical procedures, a plurality of the Supreme Court stated that a state regulation is unconstitutional when it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of the nonviable fetus." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. at 877 (plurality). (Although the lead opinion in *Casey* was joined by only three Justices, it is the holding of the Court under *Marks v. United States*, 430 U.S. 188, 193 (1977).) In so doing, the Court repudiated decisions such as *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), because they "undervalued the State's interest in potential life." 505 U.S. at 873. Rather, the *Casey* Court recognized that "Not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right. . . . Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure." *Id.* at 873-74. Under *Casey*, a plaintiff challenging a statute must prove "that in a large fraction of the cases in which [the Act] is relevant, it will operate as a

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circumstances to be facially invalid, applies in the abortion context. If *Salerno* does apply, then obviously the Act survives. The issue is pending before this court in a similar case brought under Illinois law. *See Hope Clinic v. Ryan*, 995 F. Supp. 847, 859 (N.D. Ill. 1998), appeal docketed, No. 98-1726 (7th Cir. March 23, 1998). For purposes of this case, I assume that the "undue burden" test of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992), and not the more stringent *Salerno* test, applies.

substantial obstacle to a woman's choice to undergo an abortion." *Id.* at 895.

The district court has given the statute its proper (and logical) narrow construction, thus confining the ban to the D&X abortion procedure. Contrary to the claim of the plaintiffs, the court concluded that the law has no effect on the commonly-used D&E procedure used for both pre-and post-viability abortions. The record does not show that any pregnant woman would forego, or be prevented from having, an abortion because the D&X procedure was not available. The D&X procedure is very rarely used, which suggests that a ban would have a minimal if any effect on abortion practices. As this court notes, the D&X is not even considered except for late-term abortions, *ante* at 7, but according to the AMA report, 89% of all abortions occur within the first 12 weeks of pregnancy, and only 1 percent occur after the twentieth week. Similarly, among the plaintiff physicians, only Dr. Christensen performs D&X abortions.[2] In 1997, he performed 2350 abortions in Wisconsin, 300 of which were second trimester abortions. Yet, he performs only one or two D&X procedures per year. And Dr. Bernard Smith, who performed approximately 2500 first trimester and 500 second trimester abortions in Wisconsin in 1997, does not even perform the D&X procedure. It seems counterintuitive that before the law was enacted Dr. Smith had decided not to perform the D&X procedure, yet he now contends that the absence of the D&X is a substantial obstacle to a woman obtaining an abortion. This disingenuity is what likely caused the district court to

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[2] There is no evidence in the record that any physician in Wisconsin, other than Dr. Christensen, performs the D&X procedure. And as the Supreme Court recently noted, the suggestion that an abortion regulation amounts to a substantial obstacle to abortion "is positively contradicted by the fact that only a single practitioner is affected." *Mazurek v. Armstrong*, 117 S. Ct. at 1867.

conclude at this juncture that the defendant's experts were more credible than the plaintiffs'.

Even when confined to the D&X procedure, the Act could still be unconstitutional if a large fraction of women who would otherwise have a D&X abortion decide to carry the child to term because of the greater medical risks involved in alternative abortion options. But the record does not support this contention. For example, the American Medical Association stated that "according to the scientific literature, there does not appear to be any identified situation in which the intact D&X is the only appropriate procedure to induce abortion . . . ." Similarly, the American College of Obstetricians and Gynecologists ("ACOG") wrote that "[a] select panel convened by the ACOG could identify no circumstances under which the [D&X], as defined above, would be the only option to save the life or preserve the health of the woman." Moreover, none of the physicians indicate that they have ever encountered a situation where the D&X procedure is the only procedure available to save the life or preserve the health of the mother. As the district court found, "absent from the record is a showing that [the D&X procedure] is safer in any significant way from conventional D&E's." Nothing in the record, or the court's opinion, demonstrates that this finding is clearly erroneous, and the district court correctly concluded that the ban on the D&X procedure does not place a substantial obstacle in the path of a woman deciding to have an abortion.

*2. Vagueness.*

The plaintiffs contend that the Act is ambiguous, that is, susceptible to different interpretations. Once this straw baby is in place, they go on to argue that physicians will refrain from performing legal abortions for fear of "arbitrary application," presumably by Wisconsin's prosecutors and courts. Of course, as the district court points out, "plaintiffs'

confusion concerning the meaning of [the Act] is a demon of their own creation." 9 F. Supp. 2d at 1041. They graphically describe the gruesome details of routine abortions in order to equate them with the D&X procedure that the statute describes. Despite this concern, they have not sought a definitive construction of the statute by Wisconsin's courts; rather, they have marched directly to the federal courthouse, even though they now blithely contend that "the district court's interpretation is not binding on anyone." Appellants' Brief at 40. "An important difference between the interpretation of a state statute by a federal court and by a state court is that only the latter interpretation is authoritative." *Kucharek v. Hanaway*, 902 F.2d 513, 517 (7th Cir. 1990). By enjoining the Act in its entirety, this court has "deprived the state courts of an opportunity to save at least a part of the statute by a narrowing interpretation. As a matter of comity, states ought to have that opportunity . . . ." *Id.*

Moreover, the ambiguities suggested by the plaintiffs are not plausible. The plaintiffs contend that the Act's phrase "a person partially vaginally delivers a living child" applies to every D&E procedure:

> [T]he Act remains applicable to D&Es whenever a portion of the fetus has been partially vaginally delivered before it is disarticulated. . . . This limitation also leaves the physician subject to prosecution if he extracts a disarticulated limb; and then reaches into the uterus a second time, extracts a second limb which is not disarticulated and the fetus has not yet expired.

Appellants' Reply Brief at 4. The district court correctly held that no reasonable person would equate the dismembered portions of a child with a "living child," and thus, the Act could not be fairly interpreted to apply to the

D&E procedure. The total destruction of the fetus ("disarticulation" as they put it) is accomplished within the womb. This process is clearly distinguishable from the D&X. This analysis further demonstrates the Act is easily susceptible to a narrow construction (it bans only the D&X procedure), and the state courts should have been given the opportunity to adopt this construction, a construction all of the state's prosecutors were prepared to apply.

The scienter, or intent, requirement of the statute significantly raises the bar for prosecutions, negating any legitimate claim of ambiguity. In only the D&X procedure is a child practically certain to be alive in the birth canal, and then killed by the physician. This does not mean that it never occurs in other procedures, but the gulf between a rare occurrence and something "practically certain" to occur is recognized under Wisconsin law. *Cf. State ex rel. Zent v. Yanny*, 12 N.W.2d 45, 47 (Wis. 1943) (criminal negligence "is something less than willful and wanton conduct which, by the law of this state, is the virtual equivalent of intentional wrong."). It would seem that the physicians' greatest concern would be the situation where the physician begins a non-partial birth abortion, for example a D&E, but by accident partially vaginally delivers a living child, kills it, and then completes the delivery. In that situation, the state would be required to prove beyond a reasonable doubt that the physician intended to perform a D&X, or that the D&X was a practically certain result; this provides physicians ample protection. Interestingly, Dr. Christensen did not find it necessary to cease his abortion practice during the five weeks between the Act becoming effective and our stay pending appeal. See Defendant-Appellee's Separate Appendix at 165 (press release dated May 21, 1998 in which Dr. Christensen states that he will continue to provide a "full range" of abortion services). This speaks volumes about Dr. Christensen's true view concerning the vagueness of the Act.

The district court found that the plaintiffs had a small likelihood of success on the merits. Given the scant record developed before him, the plaintiffs' failure to identify any medical necessity compelling the use of the partial birth abortion, and the evidence establishing the rarity of the partial birth abortion, this finding was not clearly erroneous.

*C. Irreparable Harm*

*1. Harm to the plaintiffs.*

The district court found that the plaintiffs would not be irreparably harmed if the Act were not enjoined. The plaintiff physicians did not indicate in their affidavits that they will cease to provide abortions because of this Act, and none of them indicate that any woman will be denied an abortion because of this Act. Similarly, we have no reason to believe that the Act will be misapplied, or that unjustified prosecutions will ensue. The sole basis relied on to support a possible of finding irreparable harm is that the Act will "force women to undergo less safe procedures than their physicians would otherwise perform." But the record in this case indicates that alternative procedures to the D&X are not less safe. As explained in *Casey*, in the absence of any evidence demonstrating how less safe the alternative procedures are (and thus, how likely a pregnant woman would opt for no abortion), a finding of irreparable harm is entirely speculative.

*2. Harm to the defendants and the public interest.*

The defendants have not identified how they would be harmed by an injunction of this Act, which is not surprising because they are merely representatives of the State, with no personal interest in the Act. However, the public interest must also be considered. It is beyond dispute that the public has a strong interest in duly passed laws becoming effective

and being respected. It is this respect for the democratic process and the will of the people that justifies a presumption of constitutionality for legislative enactments. The public also has a significant interest in the regulation of medical procedures. This interest was recognized in *Casey*, and can only be outweighed by a mother's constitutional liberty when the effect of the regulation is to deny or significantly limit the availability of all abortion procedures. Further, as the court's opinion recognizes, the D&X procedure is only considered in late term abortions, where the state's interests in the treatment and protection of potential life is greatest. *Ante* at 7. The district court weighed these interests against the scant evidence of harm alleged by the plaintiffs, and found that the preliminary injunction was unwarranted. This is not an abuse of discretion.

Summarizing, I would affirm the district court's findings that the plaintiffs had a small likelihood of success on the merits, and had demonstrated little if any irreparable harm. Further, I would conclude that the district court's weighing of the plaintiffs' harm against the public's interest, and ultimate decision not to impose a preliminary injunction, was no abuse of discretion.

## III.

Although I have set out the reasons why I would affirm the district court's denial of the preliminary injunction, I also have a few observations regarding this court's decision to reverse. As the court notes, according to Casey, the government may regulate pre-viability abortions unless so doing poses a substantial obstacle to a woman obtaining an abortion. Yet, the court does not conclude that the unavailability of the D&X procedure presents that substantial obstacle. Instead, it holds that the law cannot be justified as furthering interests such as better informing the mother contemplating abortion, protecting her health, or protecting

fetal life. *Ante* at 6-7. This holding misapplies *Casey*, which held that "the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty." 505 U.S. at 876. *Casey* also noted that "the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest" otherwise.[3] 505 U.S. at 885. *Casey* does not limit the forms of regulation permitted by the Constitution; rather, it makes clear that all regulation is permitted, provided the regulation is not unduly burdensome to a woman's right to an abortion.

This court sidesteps the undue burden test and instead concludes that Wisconsin has no legitimate interest in enacting the partial birth abortion ban. This conclusion parallels the reasoning of decisions such as *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), which were substantially limited in *Casey*. *Casey* held that these cases were in error because they did not accord proper weight to *Roe*'s acknowledgment of the government's "important interest in potential life." *Casey*, 505 U.S. at 882, 886. Requiring that Wisconsin specify the particular interest it is furthering with this statute is a throw-back to the pre-*Casey* law.

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[3] This same language was recently quoted by the Supreme Court in *Mazurek v. Armstrong*, 117 S. Ct. at 1867. *Casey* addressed a state's requirement that a physician perform an abortion. But neither *Casey* nor subsequent Supreme Court precedent suggests that the state's broad latitude to regulate extends no further than the power to require a physician to perform the abortion. *Casey* also reconsidered the Court's earlier decision in *Akron I*, 462 U.S. 416 (1983), which (wrongly) held that a state could not require that a physician (as opposed to a qualified assistant) give the woman certain information about abortion. 505 U.S. at 882-83. *Mazurek*, relying on *Casey*, held that a physician, and not a physician assistant, could similarly be required to perform the actual abortion. 117 S. Ct. at 1867-68.

Of course Wisconsin has several interests it could advance, the most obvious being to do something to preserve the "potential life" of the unborn. As the court notes, with alternative procedures to the D&X available, the statutory ban does little to protect the fetal life. But Wisconsin's legitimate interests surely go beyond rescuing the unborn. Unquestionably, Wisconsin has a material interest in how all medical procedures--including abortions--are performed by physicians licensed by the state; this is "part of the practice of medicine [which is] subject to reasonable licensing and regulation by the State." *Casey*, 505 U.S. at 884. This general interest allows it to regulate who performs abortions, where abortions are performed, and what is required for informed consent to be given. *Id.*

There is a legitimate moral interest as well. The ban on the D&X procedure can be deemed appropriate simply because of the grotesque nature of the procedure itself and the wide public awareness of it. That is not to say that all methods of legal abortion are not equally lethal and unseemly. As the court acknowledges, all methods are gruesome. But this is the one method that has been at least partially exposed to the light of day, and this exposure has apparently caused the Wisconsin legislature to label the D&X immoral. And certainly Wisconsin can legislate morality. *Cf. Milner v. Apfel*, 148 F.3d 812, 814 (7th Cir. 1998) ("How else to explain prohibitions against gambling, prostitution, public nudity and masturbation, fornication, sodomy, the sale of pornography, sexual intercourse with animals, desecration of corpses, and a variety of other morals' offenses? A traditional purpose of criminal punishment is to express moral condemnation of the criminal's acts."). This apparent (or at least plausible) perception that it is cruel and gruesome is comparable, albeit on a lesser scale, to the state's legitimate interest in the criminalization of the killing of animals through decompression or the shooting of caged

animals. *See* Wis. Stats. §§ 951.025, 951.09. These statutes do not save any animals; they merely regulate the manner in which they are killed. An uncaged animal does not suffer less when shot as compared to a caged animal, but Wisconsin still criminalizes the latter, and not the former.[4] Likewise, every method of abortion effectively destroys the "potential life" of the fetus. And as the court observes, partial birth abortion is no "more gruesome" than alternative abortion procedures performed regularly. But the court overextends when it concludes that there is no moral difference between partial birth abortion and other abortion procedures. *Ante* at 15. That is a decision for Wisconsin to make--a decision it has every right to make as long as it does not unduly burden the mother from obtaining another method of abortion. As I note below, this moral outcry apparently has not fallen on deaf ears. The exposure of this procedure has cast a bright light on the alternative procedures that are equally gruesome. This additional information could foreseeably cause mothers seeking abortions to have second thoughts, thus giving the potential life in which the state unquestionably has an interest another chance to live.

The state's interests in potential life, in regulating the practice of medicine, and in the moral underpinnings of state law are legitimate and form a solid basis for the state enacting a statute to ban D&X abortions. It is for the Wisconsin legislature, not this court, to determine whether and how to address these interests. *Cf. Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("I strongly believe that my agreement or disagreement has nothing to do

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[4] Similarly, the debate (in other sovereigns -- Wisconsin has no death penalty) over various forms of execution, such as hanging, electrocution, the gas chamber, and lethal injection involves their respective cruelty, though their outcome is the same. *See, e.g., Gray v. Lucas*, 463 U.S. 1237 (1983) (denial of certiorari) (Rehnquist, C.J., concurring; Marshall, J., dissenting).

with the right of the majority to embody their opinions in the law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical . . . ."). Balanced against the unrefuted fact that mothers seeking an abortion had access to available substitute procedures, the district court did not abuse its discretion in denying the preliminary injunction.

The court also faults the statute for not having an exception for the mother's health. The court takes the view that "the alternative [to the D&X] may not always be the best from the standpoint of the mother's health." *Ante* at 7. As noted above, I have serious doubts that the record in this case supports this conclusion. Both the AMA and the ACOG were unable to identify any situation in which the D&X is safer than alternatives. The mere suggestion by these medical groups that physicians should have unfettered discretion in deciding how to perform an abortion is insufficient to support the conclusion that the D&X is safer than other abortion procedures. Similarly, Dr. Christensen very rarely performs the D&X procedure, and Dr. Smith, who performs 3000 abortions per year, does not use the D&X. The safety of the alternatives is demonstrated by Dr. Smith's complete avoidance of the procedure, and Dr. Christensen's use of the D&X in only 1-2 of the 2300 abortions he performs each year. Thus it is disingenuous, to say the least, for them to say it may be the safest procedure for some women. The D&E method may create risks, but it is the one used in 99% of abortions performed after 12 weeks' gestation.

But even if we put aside this factual dispute, the legal conclusion reached by the court is still insufficient to invalidate the Act. To fail the undue burden test, the alternatives to the D&X must be sufficiently risky as to present a substantial obstacle to a woman obtaining an

abortion. The district court concluded that this fact was not present in the record, and the court agrees to the extent that the risk of alternatives to the D&X, as compared to the D&X itself, are "unknown." *Ante* at 10. There is no suggestion in the court's opinion that the risks are more than "*de minimis*." *Id.* *Casey* addressed a similar lack of evidence, and concluded the challenged law should not be presumed to be unconstitutional. The Court was faced with Pennsylvania's law imposing a 24-hour waiting period between a woman requesting an abortion and the abortion procedure being performed. 505 U.S. at 885-86. The Court noted that this delay, in practice, generally results in a longer delay than 24 hours, and may increase the woman's exposure to harassment and hostility of protesters outside abortion clinics. *Id.* at 886. Further, the Court noted that the delay increased the cost and risk of abortion procedures. *Id.* But the Court concluded that despite this evidence, the waiting period did not impose "a real health risk." *Id.* Comparatively speaking, the partial birth abortion ban seems much less burdensome than even the 24-hour delay that the Court approved. As this court notes, the Act "merely bans one method of abortion, leaving all others unregulated," *ante* at 7, and the court does not conclude that the unknown differences between the D&X and alternative procedures amount to an "appreciable health risk," as *Casey* requires to implicate constitutional concerns. *Id.* at 885. If, as the court notes, it is not "clear that the [health] risk is slight," *ante* at 11, then the plaintiffs obviously have not met their burden of showing that the health risk is appreciable.

The court also cites several pre-*Casey* decisions for the proposition that maternal health must be the physician's paramount concern. *Ante* at 10. The court's reliance on these cases is misplaced; rather, *Casey*'s undue burden test is the law, and the court must apply it. No doubt maternal health remains a significant interest, but in the absence of an "appreciable health risk," 505 U.S. at 885, the state may

impose a reasonable burden. And any burden imposed here is negligible at most.

Finally, I take issue with the court's ruling that the defendant-intervenors lack standing to participate in this litigation. This issue was not raised in the briefs; we did not have the benefit of argument by any of the parties. Also, because the defendant-intervenors were denied an opportunity to present oral argument, we were not able to explore this issue. The court presumes that the defendant-intervenors' spouses share their views of abortion. This presumption is not only factually unsupported, but it also appears that the Supreme Court has presumed the opposite. The *Casey* Court, in holding that a spousal notification requirement was unconstitutional, reasoned that "a spousal notice requirement enables the husband to wield an effective veto over his wife's decision [to undergo an abortion]." *Casey*, 505 U.S. at 897. It certainly seems incongruent that the spousal notification law was unconstitutional because husbands and wives may disagree on whether the wife should have an abortion, but in this case, we presume that they share the same view on the desirability of aborting their child. This presumption is particularly unwarranted because the defendant-intervenors are participating as representatives of all husbands and fathers whose rights are affected by the Act. And this representational status is certainly appropriate given that pregnancy is the classic case "capable of repetition, yet evading review." *Roe v. Wade*, 410 U.S. 113, 125 (1973). This decision effectively denies the defendant-intervenors the opportunity to be heard, to present arguments, and to develop a record on this issue. If the court is concerned that the defendant-intervenors lack standing, the district court should be directed to review this issue and make appropriate findings, which we would then review in the standard due process.

## IV.

This is a very unpleasant case. Without question in 1973 the Supreme Court in *Roe v. Wade* established a woman's right to have an abortion. *Roe* also went on to say that "if the state is interested in protecting fetal life after viability, it may go so far to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother." *Roe*, 410 U.S. at 163-64. Although one question before us is whether the state's proscription of partial birth abortion interferes with the mother's health, the plaintiffs' primary complaint is that this "vague" and "overbroad" statute interferes with the woman's right created in *Roe*. To verify this interference the plaintiffs have set out in grotesque detail how human fetuses at every stage of development--"potentiality of human life," as *Roe* puts it--are destroyed and dismembered with suction, scalpels, scissors, and other medical instruments usually used to *save* lives. The state has attempted to ban one rare procedure, not many as the plaintiffs insist and as this court affirms. And there is no evidence of any appreciable threat to a mother's health if she cannot obtain a D&X. Thus, even under the restrictions of *Roe*, a state should surely be able to proscribe an "abortion" of a live baby that is half-born.

As the court notes in its rational basis discussion, if there is always an equally safe alternative to a partial birth abortion, "the statute cannot discourage abortions--cannot save any fetuses--but can merely shift their locus from the birth canal to the uterus." *Ante* at 13. No doubt when this statute is properly construed-that it bans only the rarely-used D&X procedure-it does not appear to accomplish much in the way of saving babies. But these laws have certainly elevated the public's concern over the fate of the "potential human lives" that are exposed to abortion.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court turned the spotlight on the more obscure language in *Roe v. Wade*--that the state retains an "important and legitimate interest in potential life." *Casey*, 505 U.S. at 871. *Casey*, while reaffirming a woman's right to have an abortion, seems to place no limit on the state's ability to require that a woman considering an abortion be fully informed of the "consequences to the fetus, even when those consequences have no direct relation to her health." *Id.* at 882. Therefore, as long as the information is truthful and not misleading, "informed choice" can include considerations of the effect of abortion on the unborn child. This court criticizes what it perceives to be an arbitrary and irrational legislative effort singling out the D&X procedure, a "gruesome" procedure which almost never occurs. *Ante* at 14- 16. With this criticism in mind, following the Supreme Court's green light for informed choice in *Casey*, the legislature might find a more effective way to reduce abortions by requiring that mothers contemplating abortion be given the information similar to that which the plaintiffs have supplied in this case. A woman might consider adoption as an alternative after having to read Dr. Christensen's affidavit where he describes how he "disarticulates" the fetus and otherwise destroys the "beating heart and living cells." Or perhaps the abortion doctor should explain, in line with the court's reference to Michael Burnhill's article, *ante* at 14, that beyond ten weeks' gestation, "the fragments should be reassembled to see if the fetus is essentially complete." Or, on a more positive note, when the abortion doctor does a precautionary ultrasound to determine whether the fetus is six or sixteen weeks along, why not require that he turn the screen so that the woman can see the image of her baby and its stage of development? She would at least have a limited view of a beating heart, the beating heart the doctors in today's case are so concerned about leaving behind when they pull one dismembered part of the fetus from the mother's body. In another direction,

perhaps the state could require that although a woman's right to an abortion cannot be unduly burdened, if a baby can survive the abortion the state must protect it. In other words, in every abortion does the baby necessarily have to die? *See Floyd v. Anders*, 440 F. Supp. 535 (D.S.C. 1977) (three-judge panel), *vacated*, 440 U.S. 445 (1979).

The state's interest in potential life cannot be ignored, and the district court was correct in applying a narrow construction to this law and denying the injunctive relief that this court has now granted. The court today acknowledges that partial birth abortion is gruesome, but it notes that so are many surgical procedures. But this is no routine surgical procedure. In a gall bladder operation, for example, the doctor removes and destroys a diseased organ, leaving behind a healthier person. In partial birth abortion, the doctor destroys a "potential" life. Perhaps the mother is healthier, but the baby is dead. In a Caesarian delivery, perhaps gruesome to see by some standards, the doctor snips the umbilical cord and removes a live baby. In a partial birth abortion, the doctor snips the brain stem and removes a dead baby.

These dramatic and distressing descriptions have obviously caused many citizens and thus many legislators to react with legislative attempts to ban the procedure. Courts have an obligation to construe these statutes narrowly to enable them to pass constitutional muster where possible. Whether this statute would hold up after all of the evidence is in remains to be seen on remand after further hearings on the motion for a permanent injunction. But at this stage I agree with the district court that the plaintiffs have not met the high burden required for a preliminary injunction, and I would thus affirm the court's denial.